Supreme Court, U.S.
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No. 09-842

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In the
Supreme Court of the United States

BARBARA HUSS; RODNEY HUSS,

Petitioners,

v.

JOHN OVERTON GAYDEN, M.D.; MEMPHIS OBSTETRICS AND GYNECOLOGICAL ASSOCIATION PC,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court's ruling on the insufficiency of an expert's qualifications to testify on a specific specialized issue should be accorded great deference and upheld absent plain and indisputable error amounting to a complete disregard of the controlling law or the reviewing court may apply an exacting review, reweigh qualifications and substitute its opinion that general professional training and practice in a general area of a profession is, as a matter of law, sufficient qualification for an expert witness to assess, interpret and testify about research in highly specialized branches of the profession and its bearing on the specific specialized issue in the case before the court.

2. Whether defendants' expert witnesses are subject to less exacting standards of qualification than plaintiffs' experts.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are included in the caption and on the cover. Petitioners are individuals. There is no parent or publicly held company owning 10% or more of a party corporation's stock.

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

APPLICABLE RULES 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 10

I. There is a Conflict Between the Circuits on the Standard of Review Applicable to Review of a District Court's Rulings on the Qualifications of an Expert 11

II. The Third Panel Decision Below Creates Precedent in Conflict With This Court's Decisions and Reasoning in *GE v. Joiner* and *Sprint/United Mgmt. Co. v. Mendelsohn.* 14

III. There is a Conflict Between the Third Panel Decision Below and Post-*Daubert* Decisions of the 2nd, 6th, 8th and 10th Circuits as Well as a Prior Decision of the 5th Circuit and This Court's Own Jurisprudence. 17

CONCLUSION 27

APPENDIX:

Opinion
United States Court of Appeals
for the Fifth Circuit
entered June 10, 2009 ..... A-1

Opinion
United States District Court
for the Northern District of Mississippi
Delta Division
Re: Denying Defendant's Post Trail Motions
entered October 7, 2004 ..... A-53

Final Judgment
United States District Court
for the Northern District of Mississippi
Delta Division
entered October 7, 2004 ..... A-69

Excerpts of Transcript of Trial Proceedings
on August 20, 2004 ..... A-70

Order
United States Court of Appeals
for the Fifth Circuit
Re: Denying Petition for Rehearing and
Rehearing *En Banc*
entered October 15, 2009 ..... A-75

TABLE OF AUTHORITIES

Page(s):

Cases:

985 Assocs., Ltd. v. Daewoo Elecs. Am., Inc.,
183 Vt. 208, 945 A.2d 381 (2008) 10

Battle v. Mem'l Hosp. at Gulfport,
228 F.3d 544 (5th Cir. 2000)..... 9

Broadcort Capital Corp. v.
Summa Medical Corp.,
972 F.2d 1183 (10th Cir. 1990)..... 21

City of Hobbs v. Hartford Fire Insurance,
162 F3d 576 (10th Cir. 1998)..... 21

Columbia Communs. Corp. v.
EchoStar Satellite Corp.,
2 Fed. Appx. 360 (4th Cir. 2001) 12

Commerce v. Associated Milk Producers, Inc.,
191 F3d 858 (8th Cir. 1999)..... 17, 18

Compania Administradora de Recuperacion
de Activos Administradora de Fondos de
Inversion Sociedad Anonima v. Titan Int'l, Inc.,
533 F.3d 555 (7th Cir 2008)..... 11

Compton v. Subaru of America, Inc.,
82 F.3d at 1513 (10th Cir. 1996) 21

Daubert v. Merrell Dow Pharmaceuticals,
509 U.S. 579 (1993) ..... *passim*

Diefenbach v. Sheridan Transp.,
229 F.3d 27 (1st Cir. 2000) 11-12

GE v. Joiner,
522 U.S. 136 (1997) ..... *passim*

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999) 10

Mathis v. Exxon Corp.,
302 F.3d 448 (5th Cir. 2002) 12

Meridia Prods. Liab. Litig. v. Abbott Labs.,
447 F.3d 861 (10th Cir. 2007) 23, 27

Meyerhoff v. Michelin Tire Corp.,
70 F.3d 1175 (10th Cir. 1995) 22

Prichard v. Kurucz,
22 Fed. Appx. 122, 2001 U.S. App.
LEXIS 24017 (4th Cir. 2001) 12

Ronwin v. Bayer Corp.,
332 Fed. Appx. 508 (10th Cir. 2009) 21, 23, 27

Sommer v Davis,
317 F3d 686 (6th Cir. 2003) 19

Sprint/United Mgmt. Co. v. Mendelsohn,
552 U.S. 379,
128 S. Ct. 1140 (2008) 11, 14, 15, 16

Tanner v. Westbrook,
174 F.3d 542 (5th Cir. 1999) 23

United States v. Arney,
248 F.3d 984 (10th Cir. 2001) 22

United States v. Garcia,
7 F.3d 885 (9th Cir. 1993) 12

United States v. Gray,
410 F.3d 338 (7th Cir. 2005) 11

United States v. Och,
16 Fed. Appx. 666, 2001 U.S. App.
LEXIS 17077 (9th Cir. 2001) 12

United States v. Tin Yat Chin,
371 F.3d 31 (2d Cir. 2004) 20

Watson v. United States,
485 F.3d 1100 (10th Cir 2007) 12

Weisgram v. Marley Co.,
528 U.S. 440 (2000) 24, 25

Statute:

28 U.S.C. § 1254(1) 2

Rules:

Fed. R. App. P. 35(a). 3

Fed. R. Evid. 104(a) 2, 12

Fed. R. Evid. 702 ..... 2, 12

Other:

Flexible Standards, Deferential Review: Daubert's Legacy of Confusion, 29 HARV. J.L. , &, PUB. POL'Y 1085 (2006). 10

PETITION FOR A WRIT OF CERTIORARI

Barbara and Rodney Huss (Huss) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The rulings of the United States District Court for the Northern District of Mississippi during trial and declining to set aside the jury verdict are not reported in any official or unofficial sources. They are reprinted in the Appendix to the Petition ("Pet. App.") at A-70 and A-53 respectively. The first panel decision of the United States Court of Appeals for the 5th Circuit is reported at 465 F.3d 201 (2006). The order denying rehearing en banc and granting panel rehearing of the first panel decision appears at 2006 U.S. App. LEXIS 32755, 2006 WL 5013195 (December 27, 2006). The second panel opinion withdrawing the first and certifying questions to the Mississippi Supreme Court is reported at 508 F.3d 240 (2007). The Mississippi Supreme Court's answer is reported at 991 So. 2d 162 (2008). These early opinions are not relevant to issues in the third panel opinion which is the subject of this petition. The third panel opinion, which is the subject of this petition is reported at 571 F.3d 442 (2009). (Pet. App. at A-1) The order denying panel and en banc rehearing of the third panel opinion and the opinions of the nine judges dissenting from the denials of the petitions for panel and en banc rehearing are reported at 585 F.3d 823 (2009). (Pet. App. at A-75)

JURISDICTION

The Court of Appeals entered its first judgment on September 15, 2006. On December 27, 2006, the first petition for rehearing en banc was denied and the panel granted a panel rehearing on its own motion. On November 14, 2007, the panel issued its second opinion certifying statute of limitations questions to the Mississippi Supreme Court. That court answered those questions on September 25, 2008 in a manner requiring the first panel opinion to be vacated. The Court of Appeals issued its third panel opinion vacating its first opinion, reversing the District Court on an issue of limiting expert testimony, and remanding to the District Court for retrial on June 10, 2009. The petitions for panel and en banc rehearing were denied, and the dissenting opinions were filed, on October 14, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

APPLICABLE RULES

Fed. R. Evid. 104(a):

> Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Fed. R. Evid. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to

> understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

STATEMENT OF THE CASE

After five years of review by multiple courts[1], the third panel decision in this diversity medical malpractice case caused a sharp division among the en banc judges of the 5th Circuit who refused to review two different panel decisions in this case, both on an equally divided vote. According to the dissents of nine[2] judges, the other eight are leaving a decision on the books which turns the abuse of discretion standard of review on its head, sends a clear message that the bar for qualifying as an expert has been lowered for defense experts, and leaves litigants and trial judges to cope with

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[1] All issues other than the issue upon which certiorari is sought have been finally resolved in the Husses' favor by the first panel opinion, the decision granting rehearing of the first panel opinion, the second panel opinion certifying the statute of limitations issue to the Mississippi Supreme Court, and the Mississippi Supreme Court's ruling in favor of the Husses.

[2] One judge dissenting is a senior panel judge disqualified from voting on the petition for reconsideration en banc which left the qualifying judges split equally at eight to eight resulting in a denial of rehearing en banc under Fed. R. App. P. 35(a).

conflicting precedents which simultaneously tell a trial judge he may admit, must exclude, and must admit the testimony of an expert on issues which the trial judge believes go beyond the expert's expertise based on the expert's knowledge, skill, experience, training or education. The dissenters say the history of how this case has been handled objectively demonstrates the decision to leave the third panel opinion on the books is based on social and political views of judges who have failed their obligations as an en banc court. 585 F.3d at 827-833; Pet. App. at A-86 to A-99.

In the spring of 1998, Barbara Huss was prescribed and given subcutaneous injections followed by oral pills of terbutaline in the last trimester of her pregnancy. One day after being discharged from the hospital after the birth of her daughter, she was diagnosed with peripartum cardiomy-opathy, pulmonary edema, and congestive heart failure. She and her husband sued her obstetricians and their practice for medical malpractice. They were awarded $3.5 million in compensatory damages by a jury.

The third panel decision reversed on the District Court's finding that the defendants failed to provide sufficient evidence their internist expert possessed the requisite specialized knowledge to testify on the specific issue of whether the administration of terbutaline to a pregnant patient could cause cardiomyopathy or had caused Barbara Huss' cardiomyopathy. 571 F.3d at 451-456; Pet. App. at A-16 to A-28.

The sequence of four questions which Dr. Reddix was not permitted to answer before the jury were:

- Doctor, do you have an opinion, based upon reasonable medical probabilities and upon your education, training, and experience as a physician, as well as your review of these materials I just read, as to whether or not Terbutaline caused or contributed to the cardiomyopathy suffered by Barbara Huss.
- We need you to state in narrative, you know, not too long, state your basis as to why Terbutaline in your opinion was not the cause of or contributing cause of cardiomyopathy.
- Did your review of the medical records have anything to do with your opinion as well?
- Could you indicate, state what in the medical records caused you to believe that Terbutaline is not the causative agent?

Tr. 545, 549-550; 571 F.3d at 453, Pet. App. at A-21; 585 F.3d at 831, Pet. App. at A-91 to A-92.

The initial ruling occurred during trial when the following exchange occurred out of the hearing of the jury.

> The Court: Now, on what basis is this witness qualified to offer any opinion about whether administering Terbutaline did or did not cause cardiomyopathy here?
>
> [Defendants' Counsel]: He's an internal medicine physician who treats patients with cardiomyopathies. He has a degree from Harvard in Public Health, including studying statistics. He's reviewed the medical literature. I mean, he has patients all the time who have cardiomyopathy. He knows the drug interactions.

> The Court: I don't know about that last statement. I'm inclined to think this is outside the area of his expertise.
>
> [Defendants' Counsel]: ... But Dr. Reddix, I mean he treats patients all the time. You know, internal medicine doctors prescribe prescription medications more often than any other specialty. ...
>
> The Court: I understand that. But I don't – what experience or training does he have that enables him to say that the administration of this drug did or did not probably cause cardiomyopathy?
>
> [Defendants' Counsel]: Internal medicine training. Medical school training. Years of treating patients with pulmonary edema, congestive heart failure, and cardiomyopathy. ...
>
> The Court: ... I'm not going to let him express an opinion as to whether the administration of this drug caused or did not cause the cardiomyopathy here.
>
> [Plaintiffs' Counsel:] Your honor, we want to say for the record that ... Dr. Reddix ... had absolutely no experience with Terbutaline. He's done no research on it. ...
>
> [Defendants' Counsel]: ... All physicians receive treatment [sic] on medications, prescription drugs. ...

Tr. 546-548, Pet. App. at A-71 to A-73.

The District Court reviewed this ruling and reaffirmed it in denying Defendants' post trial motions reasoning:

> Dr. Reddix's resume . . . reveals the deficiencies in Dr. Reddix's background and experience insofar as a causation expert in this case is concerned. Dr. Reddix has virtually no experience in obstetrics and gynecology and no experience whatsoever with Terbutaline. Since 1991, Dr. Reddix's employment has primarily been as a staff physician for the Job Corp [sic], the Student Health Center of Jackson State University, and the Hinds County Detention Center. There is simply nothing in Dr. Reddix's background which entitled him to express opinions as to whether Terbutaline caused the plaintiff's cardiomyopathy or whether the cardiomyopathy was idiopathic.

571 F.3d at 454, Pet. App. at A-24, A60-61.

A divided panel found the District Court abused its discretion in limiting Dr. Reddix's testimony to more general matters concerning cardiomyopathy, the idiopathic nature of peripartum cardiomyopathy, and pulmonary edema. The explanation for this holding re-examines and reweighs the internist's qualifications in great detail, stating in part:

> Dr. Reddix has a medical degree, a master's degree in public health, and is board-certified in internal medicine. At the time of trial he had fifteen years of experience as an internist. He stated that he had knowledge of cardiac conditions and toxicology from medical school and his training as an internist. He had

treated pregnant patients, and ... patients with heart diseases, cardiomyopathy, and pulmonary edema. Defendants' counsel asked Dr. Reddix whether he had studied Barbara's medical records and the medical literature relied upon by the Husses' experts; Dr. Reddix said he had. ...

We believe that the exclusion of Dr. Reddix's opinion testimony was an abuse of discretion. Dr. Reddix reviewed Barbara's records and the medical literature relied on by the Husses. ... Dr. Reddix did not need to be board-certified in cardiology or toxicology to explain that the studies relied on by the Husses do not prove a causative relationship–especially given the very small number of patients in those studies. ... In short, Dr. Reddix's education and knowledge allowed him to form a reliable opinion as to whether, as a general matter, Terbutaline causes cardiomyopathy. ... We do not think that Dr. Reddix needed to be specialized in cardiology or toxicology to act as a counterpoint to the Husses' experts. ... We believe that there were sufficient indicia in this case that Dr. Reddix would provide a reliable opinion in rebuttal to Dr. Carlton's opinion. We disagree with the magistrate judge's conclusion that there is "nothing in Dr. Reddix's background which entitled him to express opinions as to whether Terbutaline caused the plaintiff's cardiomyopathy or whether the cardiomyopathy was idiopathic." ... The ruling was an abuse of discretion. ... In a close case such as this, Dr. Reddix's testimony would "have added

> information that, if the jurors found it credible, might have been determinative" of the difficult causation questions. See *Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 553 (5th Cir. 2000).

571 F.3d at 453-456, Pet. App. at A-21 to A-28.

Judge Higginbotham's vigorous dissent pointed out the panel majority's failure to accord proper deference to the district judge's discretion and substitution of their own assessment (that general medical school training and practice in a general area of medicine was as a matter of law sufficient qualification to assess, interpret and testify about highly specialized research concerning pulmonary and cardiac side effects of a specific drug on pregnant women) created a conflict putting trial judges with serious doubts about the extent of an expert's specialized knowledge between a rock and a hard place when trying to follow precedent in exercising their gatekeeping responsibilities in regard to expert testimony. 571 F.3d at 463-467, Pet. App. at A-44 to A-52.

On petition for rehearing en banc, the 5th Circuit split evenly. All nine dissenters, including Judges King, Davis, Wiener, Benavides, Stewart, Dennis and Prado joined one or both of Judges Elrod's and Higginbotham's sharp dissents. These dissents emphasize the importance of the particular expert evidence issues and the third panel opinion in this case to *Daubert* jurisprudence as a whole. They point out the problems the third panel decision creates for both litigants and judges in attempting to discern and follow the law in future assessments of experts' qualifications to testify on complex issues

specific to the cases before our courts. Judges Higginbotham, King, Davis, Dennis, Wiener, Benavides, and Stewart also stated the third panel opinion unjustifiably sets lower standards of qualifications for defense experts than for plaintiffs' experts, particularly in the area of medical causation. 585 F.3d at 827-833, Pet. App. at A-86 to A-99.

REASONS FOR GRANTING THE PETITION

Despite a decade of appellate review of evidentiary rulings on expert evidence since this Court's trilogy[3] of landmark decisions in the 1990's, litigants and lower courts remain confused.[4] Decisions on the admission of expert testimony vary widely throughout the federal courts. Few appellate decisions focus exclusively or even primarily on expert evidence or expert qualifications as do the third panel decision and the en banc rehearing dissents of the nine judges below in this case. The necessarily flexible criteria which allow the rules on expert evidence to adapt to the infinite variety of cases in our courts and the deference usually given to the greater familiarity of our trial judges with the specifics of individual cases cause those few appellate decisions focusing exclusively or primarily on rulings on expert evidence or qualifications and reversing for abuse of discretion to take on far

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[3] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), *GE v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

[4] *985 Assocs., Ltd. v. Daewoo Elecs. Am., Inc.*, 183 Vt. 208, 945 A.2d 381, 384 (2008) citing Note, *Flexible Standards, Deferential Review: Daubert's Legacy of Confusion*, 29 HARV. J.L., &, PUB. POL'Y 1085 (2006).

greater significance than most decisions reviewing such rulings. The depth of division of opinion reflected in the many opinions by the learned judges of the 5th Circuit in this case and the conflicts between the third panel opinion in this case and opinions of this Court, post-*Daubert* decisions of the other Circuits as well as prior post-*Daubert* opinions of the 5th Circuit demonstrate the dire need for elucidation from this Court on the law applicable to evaluation of expert qualifications in the context of this Court's *Daubert* jurisprudence. Such guidance is needed in order to bring a reasonable state of predictability, reliability and uniformity to the law on who is qualified to provide what expert testimony in our federal courts.

I. There is a Conflict Between the Circuits on the Standard of Review Applicable to Review of a District Court's Rulings on the Qualifications of an Expert

The 7th Circuit continues to apply a de novo standard of review to district court rulings on the qualifications of an expert even after this Court's decisions in *Daubert, Joiner,* and *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 128 S. Ct. 1140 (2008). See *Compania Administradora de Recuperacion de Activos Administradora de Fondos de Inversion Sociedad Anonima v. Titan Int'l, Inc.*, 533 F.3d 555, 559 (7th Cir 2008); *United States v. Gray*, 410 F.3d 338, 347 (7th Cir. 2005). The 1st, 4th, 9th and 10th Circuits clearly apply a different standard reviewing a district court's determinations on the qualifications of an expert I as one branch of the district court's *Daubert* / 702 gatekeeping responsibilities under the deferential abuse of discretion standard of review. See *Diefenbach v.*

Sheridan Transp., 229 F.3d 27, 30 (1st Cir. 2000); *Prichard v. Kurucz*, 22 Fed. Appx. 122, 126-127, 2001 U.S. App. LEXIS 24017 **10-11 (4th Cir. 2001); *Columbia Communs. Corp. v. EchoStar Satellite Corp.*, 2 Fed. Appx. 360, 370 (4th Cir. 2001); *United States v. Och*, 16 Fed. Appx. 666, 2001 U.S. App. LEXIS 17077 (9th Cir. 2001) citing *United States v. Garcia*, 7 F.3d 885, 889 (9th Cir. 1993); *Watson v. United States*,485 F.3d 1100, 1105 (10th Cir 2007)

In the third panel decision in this case, the 5th Circuit acknowledges that the admission or exclusion of expert testimony is reviewed for abuse of discretion. But as a part of its review of the District Court's ruling limiting the scope of Dr. Reddix's testimony because of his limited qualifications, the panel majority opinion also holds:

> [w]hether an individual is qualified to testify as an expert is a question of law. *Mathis*, 302 F.3d at 459 (citing Fed. R. Evid. 104(a))

571 F.3d at 452, Pet. App. at A-20. As questions of law are reviewed de novo, the placement of this statement in the paragraph on the standard of review telegraphs the panel majority's intent to engage in a much stricter level of review than the deferential abuse of discretion level in reviewing the District Court's findings on the limitations of Dr. Reddix's qualifications.

The citation to *Mathis v. Exxon Corp.*, 302 F.3d 448, 459 (5th Cir. 2002) further demonstrates the application of the same standard used by the 7th Circuit and the conflict with the application of the abuse of discretion standard to qualification of experts by the 1st, 4th, 9th and 10th Circuits. In *Mathis*, the lower court record did not indicate the

trial judge's reasoning for admitting the expert's testimony. Rather than remanding the case, the 5th Circuit engaged in an explicit de novo review of the record and decided the issue itself because "admissibility is a legal question--one ill-suited to ... further explication by the district court."

The third panel majority then engages in four full pages of an extremely detailed reweighing of the evidence related to Dr. Reddix's qualifications and the parties' arguments on his qualifications after which it concludes:

> We believe that there were sufficient indicia in this case that Dr. Reddix would provide a reliable opinion in rebuttal to Dr. Carlton's opinion. We disagree with the magistrate judge's conclusion that there is "nothing in Dr. Reddix's background which entitled him to express opinions as to whether Terbutaline caused the plaintiff's cardiomy-opathy or whether the cardiomyopathy was idiopathic."

571 F.3d at 452-456, Pet. App. at A-19 to A-28. Thus it is clear that on the qualification aspect of its review of the District Court's ruling limiting Dr. Reddix's testimony, the third panel opinion in this case applies a stricter standard of review than the deferential abuse of discretion standard which is in conflict with the 1st, 4th, 9th and 10th Circuits. At no point in the opinion does the panel majority give any sort of deference to any part of the trial court's consideration of Dr. Reddix's qualifications or his testimony. It is in fact applying the same de novo standard of review which the 7th Circuit explicitly states it applies to reviewing rulings on qualifications of expert witnesses.

II. The Third Panel Decision Below Creates Precedent in Conflict With This Court's Decisions and Reasoning in *GE v. Joiner* and *Sprint/United Mgmt. Co. v. Mendelsohn.*

This Court has held the hallmark of abuse of discretion review of evidentiary rulings on expert testimony is the according of deference to a district court's reasoning and decision, particularly in regard to the fit between the expert, the testimony and the case. *GE v. Joiner*, 522 U.S. 136, 141-142 (1997) Applying a less deferential or overly stringent review under the guise of *Daubert* and its progeny is contrary to the abuse of discretion standard. *Id*; see also *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 128 S. Ct. 1140 (2008) (reinstating district court's limitation on admission of evidence because the appellate court "did not accord the District Court the deference" that is the "hallmark of abuse-of-discretion review.")

This Court has held the level of scrutiny on review must always be the same and always requires deference to the district court's ruling. It cannot differ or be more searching because the trial court's ruling admits or excludes evidence or is outcome determinative. 522 U.S. at 141-143. It necessarily follows from this reasoning that neither the level of the scrutiny nor the level of qualifications or reliability required for admissibility of expert evidence can vary depending upon whether the evidence is offered by a plaintiff or a defendant. What varies is the details of the facts of a particular case, the details of the science as applied to the facts of a particular case especially in cases involving complex science or facts, each party's theory of the case, and what the focus of each party's evidence and

the disputed issues at trial are in a particular case. The district court's greater familiarity with these points is why the district court is granted broad discretion even in rulings on the admission of expert testimony and why appellate courts must grant great deference to the district court's weighing of these points and the fit of the proffered expert evidence to the case. *Mendelsohn*, 128 S. Ct. at 1144-1145; *Joiner*, 522 U.S. at 146. This Court's factual analysis in *Joiner* demonstrates even where the appellate court would reach a different conclusion than the district court did on the fit between the facts of the particular case and admission of a particular expert's testimony, that difference does not support finding an abuse of discretion.

The District Court explained its reasoning for why the expert's testimony was not a close enough fit to the requirements of the particular case to be admissible. Such a decision that there is too great a gap between the expert, his testimony, and the specifics of a particular case, and the proper deference to it is precisely the kind of decision which the hallmark deference of the abuse of discretion standard requires an appellate court to respect. See 522 U.S. at 143-146.

In *Mendelsohn*, the 10th Circuit had recited the correct abuse of discretion standard of review. But this Court found it failed to accord the required deference to the district court's evidentiary ruling when it engaged in its own inquiry into whether the evidence was relevant or prejudicial and concluded the district court must have applied an incorrect legal standard in reaching a different conclusion than it would have reached. This Court held

> "[w]ith respect to evidentiary questions ..., a district court virtually always is in the better position [than the appellate court] to assess the admissibility of the evidence in the context of the particular case before it."

128 S. Ct. at 1146 This is particularly true of evidentiary rulings which "requir[e] a fact-intensive, context-specific inquiry" or are "fact based and depen[d] on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Id* at 1147.

The third panel decision here, like the 10th Circuit decision in *Mendelsohn*, stated an abuse of discretion standard of review applied, but did not "accord the District Court the deference" this Court has held is the "hallmark of abuse-of- discretion review." Instead it did its own weighing of the internist's qualifications substituting its opinion for the District Court's as to precisely what testimony was excluded, the reason the testimony was being offered, the issues to which it was or was not relevant, and the sufficiency of the fit between the expert's qualifications, the questions being asked, the facts of this particular case, and the reliability and admissibility of the testimony. In failing to accord the deference required, the panel opinion directly conflicts with *Joiner* and *Mendelsohn*. As Judge Higginbotham and eight other judges of the 5th Circuit have stated, this decision turns the abuse of discretion standard on its head and should not be permitted to remain on the books where it unsettles the law and precedent on expert qualifications and testimony.

III. There is a Conflict Between the Third Panel Decision Below and Post-*Daubert* Decisions of the 2nd, 6th, 8th and 10th Circuits as Well as a Prior Decision of the 5th Circuit and This Court's Own Jurisprudence.

It is not just the standard of review applied in this case which creates a conflict with decisions of other circuits and of this Court. The third panel majority opinion rests on the premise that as a matter of law a professional who is licensed to practice as a generalist in a professional field and has practiced as such a generalist for several years necessarily possesses the knowledge to evaluate the soundness of published research and testify on complex issues in very specialized areas of his profession. That premise and the third panel decision conflicts with decisions of the 2nd, 6th, 8th and 10th Circuits as well as a prior decision of the 5th Circuit and this Court's own jurisprudence.

In *Commerce v. Associated Milk Producers, Inc.*, 191 F3d 858 (8th Cir. 1999), the plaintiff was exposed to aflatoxin M-1 (AFM), a potent hepotocarcinogen. After developing laryngeal cancer, he filed suit alleging his cancer had been caused by his exposure to the AFM. The district court excluded the plaintiff's medical causation expert who would have testified his cancer was more probably than not caused by his exposure to AFM. The 8th Circuit disagreed with many points in the district court's analysis and the weight the district court gave to various items in deciding to exclude the plaintiff's expert, but applying the *Joiner* abuse of discretion standard of review, it held:

> our question is: Did the district court judge [sic] between the conflicting conclusions of the parties' expert witnesses or did he reject the testimony of plaintiffs' experts because under *Daubert* it was neither reliable nor relevant? ... In our view, the scales are tipped in favor of affirming the district court because we are instructed by *General Electric* that we are to review the district court's decision for an abuse of discretion. The following findings support the view that the district court did not abuse its discretion: ... He noted that none of the plaintiffs' experts based their opinions on any pre-litigation research on aflatoxins done by them, that none were oncologists, that none examined or treated McDougal, ... We have noted in our opinion that this is a difficult case; and we have pointed out that a district court is not to judge the validity of competing conclusions of expert witnesses, but rather is to limit its gate-keeping role to determining whether the expert testimony offered by the parties meets the *Daubert* standards of reliability and relevance. Moreover, we have cautioned that the district court may not rely solely on the lack of published studies supporting an expert's conclusions because in some cases scientific propositions may have been too new to have been published or tested. On balance, however, we believe that the district court did not abuse its discretion here in excluding the testimony of the expert witnesses offered by the plaintiffs.

191 F.3d at 863-865.

The 8th Circuit clearly does not accept the proposition that as a matter of law a professional who is licensed to practice as a generalist in a professional field and has practiced as such a generalist for several years necessarily possesses the knowledge to evaluate the soundness of research and testify on complex causation issues in very specialized areas of his profession. Clearly it does not accept that any doctor with a general primary care practice has the knowledge to evaluate the soundness of research and testify on complex issues such as whether specific drugs or substances can cause a particular disease in humans. It would have found that the District Court's points concerning Dr. Reddix's limited training and experience in the fields of cardiology, obstetrics and gynecology, his lack of any specialized knowledge or experience concerning terbutaline, and the very general nature of his medical practice were sufficient to demonstrate no abuse of discretion in the District Court's finding that Dr. Reddix was not qualified to testify concerning the existence or lack of a causal relationship between terbutaline and cardiomyopathy.

The 6th Circuit has similarly held that a district court does not abuse its discretion in requiring a proffered physician expert to have more specialized knowledge in the issues of the case before the court than all physician necessarily possess. In *Sommer v. Davis*, 317 F.3d 686 (6th Cir. 2003), the doctor proffered as an expert was licensed to practice in the defendant's specialty in a qualified state, but his testimony demonstrated that he lacked any knowledge specific to the standard of care in the specific location at issue in the case. The 6th Circuit

upheld the trial court's exclusion deferring to the trial court's judgment on the fit between the expert and his knowledge of the specific issues in the case.

United States v. Tin Yat Chin, 371 F.3d 31 (2d Cir. 2004) also rejects the concept that as a matter of law a professional who is expert in the general field of his profession and has practiced for several years necessarily possesses the knowledge to evaluate the soundness of published research and testify on complex issues in very specialized areas of his profession. Although the expert was fluent in both Manderin and Cantonese and taught both languages, and had degrees in both linguistics and anthropology, the court found the witness was not sufficiently knowledgeable about the literature on the subject of a Cantonese faking a Manderin accent to be qualified to testify as an expert on the difficulty or inability to fake such an accent. Thus, the 2d Circuit would also have rejected the analysis and decision of the third panel in this case.

The 10th Circuit also upheld a district court's refusal to accept an expert clearly qualified generally in his profession because of the limitations of his knowledge in areas of the profession specific to the case before the court. The 10th Circuit held:

> The trial judge here found that Mr. Charleston's opinion would not be helpful to the jury because: (1) the jury was capable of determining the bad faith issue on its own, E.G. Thompson, 34 F.3d at 941; and (2) Mr. Charleston lacked specialized knowledge on New Mexico bad faith cases and his experience was with first party, not third party insurance disputes. III App. at 694.

> We feel that the judge did not abuse his discretion by refusing to admit Mr. Charleston's proffered testimony on this record. Though a proffered expert possesses knowledge as to a general field, the expert who lacks specific knowledge does not necessarily assist the jury. *Broadcort Capital Corp. v. Summa Medical Corp.*, 972 F.2d 1183, 1195 (10th Cir. 1990); but see *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1519-20 (10th Cir. 1996) (district court did not abuse its discretion in admitting expert witness' testimony though witness possessed general knowledge). Mr. Charleston did not demonstrate knowledge specific to New Mexico and the handling of third party claims. Therefore, the judge did not abuse its discretion in relying upon these factors to exclude the testimony. See *Broadcort Capital*, 972 F.2d at 1195.

City of Hobbs v. Hartford Fire Insurance, 162 F3d 576, 587 (10th Cir. 1998)

Most recently, in *Ronwin v. Bayer Corp.*, 332 Fed. Appx. 508 (10th Cir. 2009), the 10th Circuit held it was not an abuse of discretion for a district court to exclude a surgeon's testimony on the causal relationship between a statin drug and torn rotator cuffs. The 10th Circuit reasoned:

> the district court held that Drs. Reyes and Ronwin were not qualified by their knowledge, skill, experience, training, or education to testify regarding a causal connection between Baycol ingestion and plaintiff's shoulder injury. The court noted Dr. Reyes's lack of any

practical experience or training with respect to Baycol or statins in general and Dr. Ronwin's "lengthy departure from active research, publication, and teaching." Aplee. App., Vol. II at 803. A district court has "wide discretion" in determining whether a witness's experience is sufficient to qualify him as an expert. *United States v. Arney*, 248 F.3d 984, 991 (10th Cir. 2001). Dr. Ronwin contends that Dr. Reyes's extensive orthopedic surgery experience qualifies him to opine on the cause of plaintiff's rotator cuff tear. But we have specifically rejected the contention that surgical experience alone is sufficient to qualify an expert to testify regarding an issue "not within the reasonable confines of her subject area." *Ralston*, 275 F.3d at 970 (holding district court did not abuse its discretion in excluding testimony by board-certified orthopedic surgeon where she had no practical, research, or publication experience regarding the subject matter of her proffered expert testimony, see Id. at 969-70). Nor did the district court abuse its discretion in holding that Dr. Ronwin's relevant practical experience in biochemistry was too stale to qualify him to give an expert causation opinion in this case. See *Meyerhoff v. Michelin Tire Corp.*, 70 F.3d 1175, 1182 (10th Cir. 1995) (upholding exclusion of expert testimony based, in part, on proffered witness's absence from the relevant industry for over 30 years). Applying the proper standard, we cannot conclude that the district court abused its discretion in concluding that Drs. Reyes and

> Ronwin were not qualified to testify regarding whether Baycol caused plaintiff's injuries.

332 Fed. Appx. at 512-513.

The 10th Circuit has also held that a district court did not abuse its discretion is permitting a "pharmacologist, with an attendant expertise on the effects of drugs on the body" to testify that the drug Merida temporarily elevates blood pressure in some patients but refusing to admit his opinion that this elevation "poses a risk to heart health that outweighs any corresponding cardiac benefit of weight loss" because he was "not a cardiologist, and that he 'shows no training or experience allowing him to answer this question.'" *Meridia Prods. Liab. Litig. v. Abbott Labs.*, 447 F.3d 861, 868 (10th Cir. 2007). Based on this reasoning, the 10th Circuit would clearly have decided the present case differently than the third panel opinion did.

The most striking example demonstrating that this case conflicts with the legal principle that it is not an abuse of discretion for a district court to require an medical causation expert to possess specialized knowledge related to the cause of a particular disease in the human body beyond the ken of a general medical professional is *Tanner v. Westbrook*, 174 F.3d 542 (5th Cir. 1999) as pointed out by the panel dissent and the dissents of nine judges to the refusal to reconsider the panel decision en banc. *Tanner* reversed a judgment for plaintiffs where the trial court over objection allowed a medical doctor with general medical training to give an opinion that the actions of doctors attending a childbirth caused the child to contract cerebral palsy, a disease like cardiomyopathy which can have many

causes. It held where an medical expert's opinion "hinges on . . . the depth of his knowledge of a complicated, specialized medical subject matter," it is an abuse of discretion to admit testimony of an expert who has only generalized medical knowledge of that particular aspect of medicine. 174 F.2d at 547.

In *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000), this Court, citing both *Daubert* and *Joiner*, pointed out,

> [s]ince *Daubert* ... parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet. ... It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence... .

Parties and courts have certainly been on notice that the standards for admission of expert testimony in the field of causation of medical injuries and diseases by exposure to drugs and other chemical or toxic substances are indeed exacting and that this particular field of science is one of the most specialized fields in which our district courts must exercise their gatekeeping roles. It was the field of science at issue in both *Daubert* and *Joiner*.

After *Joiner*, federal appellate courts have clearly been put on notice that this is a highly specialized field where the district court must be given wide discretion. An appellate court must give great deference to a district court's ruling regarding expert testimony in this area. 522 U.S. at 142-143. It may not apply a more stringent standard of review because the district court excluded evidence rather

than admitting it or because the ruling may be outcome determinative. *Id.*

Yet that is precisely what the third panel majority opinion did. It raised the level of review to the point of completely disregarding the District Court's findings giving the District Court no deference at all. It also lowered the bar on the level of knowledge a defendant's expert must have to give reliable testimony on whether the particular studies at issue in the case are factually close enough to the facts of the case to support either side's point of view so far that it can not be considered exacting at all. Half the judges voting on the petition for rehearing en banc make it clear that the third panel majority opinion sets a precedent that is directly contrary to *Daubert*, *Joiner* and the exacting standard this Court recognized in *Weisgram*. It does so in the same field of scientific expertise where this court developed that precedent.

The third panel majority held as a matter of law, Dr. Reddix's training and experience "as a medical professional" provide sufficient "education and knowledge [to] allo[w] him to form a reliable opinion as to whether, as a general matter, Terbutaline causes cardiomyopathy." 571 F.3d at 455, Pet. App. at A-25 to A26. By Dr. Reddix's own testimony, that training and education consists of the limited general introduction to basic toxicology and cardiology all doctors receive in medical schools to receive a license to practice medicine. 571 F.3d at 453, Pet. App. at A-21. Defendants' arguments, which this Court has said must be assumed to be their best evidence of his qualifications, claim those "best" qualifications to opine on the issue of terbutaline causing cardiomyopathy consist of

> treat[ing] patients with heart conditions--some of whom were pregnant, [being] "familiar with the term cardiomyopathy," treat[ing] patients with enlarged hearts and cardiomyopathy, and prescrib[ing] drugs similar to Terbutaline.

571 F.3d at 454, Pet. App. at A-24. The District Court's factual findings are that Dr. Reddix' experience consists of

> virtually no experience in obstetrics and gynecology and no experience whatsoever with Terbutaline. Since 1991, Dr. Reddix's employment has primarily been as a staff physician for the Job Corp [sic], the Student Health Center of Jackson State University, and the Hinds County Detention Center.

571 F.3d at 454, Pet. App. at A-24, A-60 to A-61.

To be sure, Dr. Reddix is a licensed physician and he has passed exams attesting to his proficiency as a generalist in medicine fitted to treat patients as a primary care physician. But that says nothing about his knowledge of whether terbutaline, or any drug for that matter, is capable of causing cardiomyopathy. There is nothing in the third panel majority opinion demonstrating that it relied on any specialized knowledge possessed by Dr. Reddix going beyond what a general physician treating patients in a primary care setting who happen to have a heart condition of any cause would have about any drugs and heart conditions in general. In short, the third panel majority decision amounts to a rule of law that the general medical school training of any licensed physician along with the treatment of patients in general primary care settings is sufficient to testify

to whether a specific drug the doctor has never used is capable of causing a specific disease for which he has treated some patients.

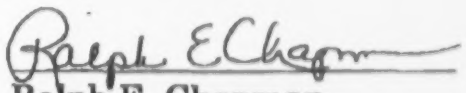
Our federal courts have recognized that causation of diseases by drugs is a highly specialized issue in the field of medicine which usually requires far greater and different methods of proof than general physicians require knowledge of in order to treat the disease after a patient has contracted it from whatever cause. The general education and experience required to obtain a license to practice medicine and to treat patients as a primary care physician, such as an internist or family medicine specialist or even a surgeon, is vastly different from the training and experience necessary to scientifically analyze and research, or evaluate the research on, the causal connection between a specific drug prescribed in a specialized field of medicine, such as high risk pregnancy or even cholesterol treatment. *Ronwin v. Bayer Corp.*, 332 Fed. Appx. at 512-513; *Meridia Prods. Liab. Litig. v. Abbott Labs.*, 447 F.3d 861, 868 (10th Cir. 2007). *Daubert* and *Joiner* clearly support this point.

CONCLUSION

Instead of deferring to a competent District Court properly exercising its gatekeeping authority and requiring all experts to meet the exacting standards this Court has held our rules of evidence require, the third panel decision in this case throws out the exacting standards this Court has put everyone on notice of when a district court excludes a defense expert with minimal qualifications and the appellate court believes the ruling may have had an effect on the outcome. That decision clearly conflicts with this

Court's rulings and the rulings of several other Circuits on an issue so important that half the judges of the 5th Circuit broke with tradition and not only expressed their reasons for dissenting from the other half's denial of rehearing en banc, but were sharply critical of what they see as dereliction of the duty as an en banc court to address conflicts in precedent and to decide all cases impartially.

Respectfully Submitted,



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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-60962

BARBARA HUSS; RODNEY HUSS
Plaintiffs - Appellees

v.

JOHN OVERTON GAYDEN, M.D.; MEMPHIS OBSTETRICS AND GYNECOLOGICAL ASSOCIATION PC
Defendants - Appellants

Appeal from the United States District Court for the Northern District of Mississippi

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Entered: June 10, 2009

Before HIGGINBOTHAM, DeMOSS, and OWEN, Circuit Judges. DeMOSS, Circuit Judge:

In this medical malpractice diversity suit, defendants appeal a jury's $3.5 million award to plaintiff Barbara Huss. We reverse and remand for a new trial.

I.

We begin with a brief overview of this litigation. Barbara Huss and her husband Rodney Huss filed this lawsuit on June 30, 2000. The parties consented to have the case heard before a magistrate judge.

Trial was held in Greenville, Mississippi on August 17–20, 2004. A jury of eight returned a general verdict in favor of Barbara Huss and awarded her $3,500,000. The jury also returned a verdict in favor of Rodney Huss, but awarded him nothing. A divided panel of this Court concluded that the applicable Mississippi statute of limitations barred the Husses' claims as a matter of law. *Huss v. Gayden* (*Huss I*), 465 F.3d 201, 208-09 (5th Cir. 2006). The Husses requested rehearing en banc. A poll was taken and a majority of the judges in active service and not disqualified did not vote in favor of granting rehearing en banc. *Huss v. Gayden* (*Huss II*), 2006 WL 5013195, at *1 (5th Cir. Dec. 27, 2006) (per curiam). However, this panel granted rehearing before the panel. In light of the Mississippi Supreme Court's opinion in *Sutherland v. Ritter*, 959 So. 2d 1004 (Miss. 2007), a panel majority *sua sponte* requested that the Mississippi Supreme Court accept a certified question regarding the statute of limitations. *Huss v. Gayden* (*Huss III*), 508 F.3d 240, 245-48 (5th Cir. 2007). The Mississippi Supreme Court accepted the question, and held that defendants' limitations defense fails as a matter of law. *See Huss v. Gayden* (*Huss IV*), 991 So. 2d 162, 165 (Miss. 2008). We now vacate our prior decision and address the remaining issues.

II.

This is a medical malpractice suit against a physician and a professional corporation of physicians. Barbara and Rodney Huss, citizens of Mississippi, allege that defendants John Gayden and Memphis Obstetrics and Gynecological Association PC ("Memphis OB/GYN"), citizens of Tennessee, negligently administered the drug Terbutaline

sulfate[1] to Barbara during her pregnancy. The manufacturer of Terbutaline was not sued.

The Husses argued at trial that defendants breached the standard of care by administering subcutaneous Terbutaline to Barbara as a tocolytic (an agent to slow or halt premature labor contractions), the prescription of a tocolytic without physical examination by a physician, the prescription of any tocolytic when Barbara was not actually in labor, and the prescription of Terbutaline for four weeks when there was no indication that Barbara was in labor. The Husses also said Barbara would not have consented to treatment with Terbutaline had she been informed of the risks. The Husses say Terbutaline caused Barbara to develop cardiomyopathy,[2] pulmonary edema, and congestive heart failure.

A.

Barbara became the patient of Dr. Andrea Giddens, a member of Memphis OB/GYN, on February 17, 1998. At that time, Barbara was twenty-seven weeks pregnant, and had a due date of May 17. Barbara informed Dr. Giddens that her medical history included one childbirth by Cesarian section, three miscarriages, prior ovarian cysts, and hypertension. Barbara's medical conditions and factors on February 17 included: weight gain of forty

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[1] Terbutaline sulfate is the generic name for Brethine. We refer to the drug throughout as Terbutaline.

[2] The terms "cardiomyopathy," "postpartum cardiomyopathy," "peripartum cardiomyopathy," and "peripartal cardiomyopathy" all refer to the same condition for purposes of this litigation.

to fifty pounds during pregnancy, swelling, near-constant nausea and vomiting, gestational diabetes (i.e., pregnancy-induced diabetes), and continued cigarette smoking throughout pregnancy. Dr. Giddens believed that the "excessive" weight gain was due in part to retention of excess fluid, or edema, as well as excessive eating. Dr. Giddens concluded that Barbara had a "high-risk pregnancy" and directed her to cease working for the remainder of her term.

On March 8, 1998, when Barbara was thirty weeks pregnant, she felt increasing cramping and pressure. She experienced contractions five to ten minutes apart, and she thought she was in labor. She sought treatment from Memphis OB/GYN's emergency room at 11:15 p.m. The on-call physician, Dr. John Albritton, attempted to stop the contractions. He did not personally examine Barbara, but communicated by telephone with a nurse, first ordering intravenous hydration and the drug Stadol. When contractions continued, Dr. Albritton ordered subcutaneous injections of Terbutaline. Barbara was given two injections, and the contractions ceased within a few hours. The next morning, March 9, 1998, defendant Dr. John Gayden, a Memphis OB/GYN physician, prescribed administration of 2.5 milligram oral Terbutaline tablets. Barbara initially received 30 pills, and was to take a pill every six hours. The prescription was refilled three times, meaning Barbara received 120 pills, or a supply for approximately four weeks. Although contractions had ceased, Dr. Gayden prescribed Terbutaline prophylactically to prevent the recurrence of pre-term contractions and to forestall premature labor and delivery. Barbara was

discharged from the hospital on the morning of March 9.

On March 10, 1998, Barbara returned to Memphis OB/GYN for a follow-up examination by Dr. Giddens. Barbara was experiencing occasional contractions at that time. Dr. Giddens concurred in the prophylactic prescription of oral Terbutaline as a tocolytic. At trial, Dr. Giddens was recognized as an expert in obstetrics and gynecology. She testified that she was concerned with Barbara's past Cesarian section. Dr. Giddens said: "I was concerned about her contracting at home and the risk for contractions . . . with a prior section is uterine rupture, which can be devastating. The baby can die. The mother can die. So I did not want her to have contractions regularly." Moreover, Dr. Giddens testified that premature delivery would have severe adverse impacts on the health of the child. Dr. Giddens said she believed it was medically proper, and within the standard of care, to prescribe Terbutaline prophylactically as a tocolytic. Terbutaline is labeled for treatment of asthma, but Dr. Giddens indicated that, when prescribed off-label as a tocolytic, it is safe, effective, and appropriate. Dr. Giddens indicated that because Barbara had not shown any signs of high blood pressure or heart problems, it was not necessary to conduct cardiac tests prior to prescribing the drug.

Aside from her treatment for premature contractions on March 8–10, 1998, Barbara experienced other complications that caused her to seek emergency treatment on several occasions before her daughter Hannah Marie Huss was delivered on May 6, 1998. Although disputed by defendants at trial, Barbara, members of her family,

and an acquaintance testified that Barbara experienced severe shortness of breath. Barbara testified that for two and one-half to three months before delivery, she had severe shortness of breath. On March 20, 1998, during a family outing, Barbara felt leaking and contractions five minutes apart. She thought that her water had broken. She testified that she also experienced shortness of breath. Barbara was placed on oxygen by emergency medical technicians and transported to a hospital. On April 5, 1998, Barbara felt uncontrollable leaking and sought treatment at a local emergency room. On Easter Sunday, April 12, 1998, Barbara experienced shortness of breath during a family dinner and once more sought treatment at an emergency room. In late April, Barbara was prescribed antibiotics for an ear infection. Barbara testified that in the weeks preceding Hannah's birth, she experienced such severe shortness of breath that she had trouble speaking and slept sitting up.

Barbara continued to see Dr. Giddens and the physicians at Memphis OB/GYN until the delivery of Hannah. She testified that she did not remember, however, when she obtained her last Terbutaline refill. When asked whether the date April 6, 1998 was correct, Barbara said: "It was in April sometime. I don't know the exact date." She recalled that she received 30 pills, or a one-week supply. While testifying, Barbara reviewed her own medical records. She was asked whether it was noted that she was still on Terbutaline on April 15. She indicated that the records said as much. When asked if she continued to take Terbutaline after this point, Barbara said yes. When asked whether she was taking Terbutaline on April 28, she also answered

yes. Barbara's medical records indicate, however, that the drug was discontinued on April 21, 1998. A record from Barbara's treatment for ear infection, filled out on April 23, 1998, lists the medications Barbara was taking; Terbutaline is not listed. When asked how a four-week supply that should have run out in mid-April lasted so long, and how the final week's refill lasted well over two weeks, Barbara explained that she did not always take four pills per day as instructed, but skipped a dose if she was sleeping well. But she insisted that this seldom occurred, and she generally took Terbutaline as she was told. Barbara also testified that after Hannah's birth she still had one or two Terbutaline tablets "left over."

By May 5, 1998, Barbara was experiencing severe swelling in her legs. Dr. Giddens testified that at that time, Barbara had toxemia. Toxemia is also known as preeclampsia; this is high blood pressure during pregnancy. Toxemia can lead to eclampsia, a seizure of pregnancy, in which the baby can lose oxygen and suffer retardation, cerebral palsy, or death. Dr. Giddens instructed Barbara to go to the hospital for delivery. Barbara's OB Assessment Record from the date of her admittance, May 5, 1998, does not indicate that she was taking Terbutaline at that time. At the hospital on May 5, attempts were made to induce labor. They were unsuccessful. The next day, May 6, 1998, Dr. Gus Giddens, the husband of Dr. Andrea Giddens, successfully performed a Cesarian section, and Hannah was born healthy. Barbara was discharged from the hospital on May 9, 1998. Her medical records from the four days Barbara spent in the

hospital indicate that she was breathing normally and without difficulty.

After returning home on May 9, Barbara experienced shortness of breath. She took one of the Terbutaline tablets that she had "left over." She had heard that Terbutaline is used to open the bronchial tubes of asthma sufferers, and she believed the Terbutaline would ameliorate the shortness of breath. However, at some point later that evening, Barbara leaned back and could not breathe. In the early morning hours of May 10, she was taken to the emergency room of Methodist South in Memphis. This facility is not a defendant and is not affiliated with defendants.

On May 10, 1998, Barbara was diagnosed by three physicians at Methodist South with peripartum cardiomyopathy, pulmonary edema, and congestive heart failure. Cardiomyopathy refers to a weak heart muscle. The condition can be temporary or chronic. Dr. Gary Murray, Barbara's treating cardiologist at the time of trial, testified that peripartum cardiomyopathy "is defined as the development of congestive heart failure in a woman occurring within one month of delivery or by five months after delivery," where there is "no other obvious cause" for the disorder. Dr. Murray said that peripartum cardiomyopathy is a rare condition occurring in one in three thousand to fifteen thousand births. Congestive heart failure is the inability of the heart to contract normally, causing a backup of fluid in the heart and throughout the body. Cardiologists measure its severity by the ejection fraction, which is the measure of the heart's ability to pump. This condition can be temporary or chronic. Pulmonary edema is the presence of fluid

seeping from the vessels of the lungs into the air sacs of the lungs. The condition inhibits breathing and can be life-threatening or fatal. It is normally a temporary condition which can be completely remedied. Testimony was presented that congestive heart failure can be associated with pulmonary edema, as the presence of excess fluid in the lungs may inhibit the heart's ability to move fluid throughout the body effectively.

An ER physician, who is not a defendant in this case, and Dr. Albritton, who was a member of Memphis OB/GYN, saw Barbara at Methodist South and each diagnosed her conditions. Dr. Albritton requested that Barbara be transferred to Methodist Hospital in Germantown (also not a defendant) and that Dr. McDonald, a cardiologist, consult with her, which he did. That same day, Dr. McDonald diagnosed Barbara as having cardiomyopathy and congestive heart failure. Her medical records from these admissions reflect severe shortness of breath and Barbara's statement that she had been complaining of shortness of breath for the last three months.

Barbara continued to see Dr. McDonald as her treating cardiologist through the fall of 1998. In October of that year, he released her to return to light work. Barbara testified that she felt worse after this and that her grandparents referred her to another cardiologist, Dr. Murray, whom she consulted in November of 1998. He concurred in the diagnosis of cardiomyopathy and continued to treat Barbara through the time of trial. At the time of trial, Barbara had made some progress, but continued to suffer from cardiomyopathy. Through treatment by Dr. Murray, Barbara's ejection fraction

increased from the low range (around 30%) in late 1998, to the low-normal range (50–55%) at the time of Dr. Murray's deposition on July 31, 2004. However, Barbara had developed orthostatic hypotension, which is a drop in blood pressure while the patient is standing. Because of this condition, which Dr. Murray could not say was related to cardiomyopathy, Barbara had to stop taking the drug Coreg. Coreg had helped to raise Barbara's ejection fraction. Dr. Murray testified that, although he had observed "a substantial improvement in her ejection fraction," Barbara's cardiomyopathy and associated congestive heart failure would likely remain life-long problems. Dr. Murray believed that these conditions endangered Barbara's life and necessitated continual medication and frequent treatment. However, Barbara no longer had pulmonary edema at the time of trial.

B.

In June of 1999, Barbara and Rodney Huss sued Dr. Andrea Giddens for medical malpractice. Dr. Giddens was Barbara's primary treating physician at Memphis OB/GYN until Hannah's birth and Barbara's discharge from the hospital on May 9, 1998. The suit against Dr. Giddens was dismissed on jurisdictional grounds.

Barbara testified that it was not until "shortly" or "less than a year" before the present suit was filed on June 30, 2000, that she became aware that her medical records had been reviewed by experts and that those experts had concluded that the administration of Terbutaline and the course of treatment by the defendants constituted negligence which may have caused or contributed to her

development of cardiomyopathy, congestive heart failure, and pulmonary edema. She did not explain why or how she obtained these expert opinions or why she did not or could not have obtained them earlier.

The jury heard conflicting evidence regarding the standard of obstetrical care and whether it was breached. The Husses presented evidence that although Terbutaline is used "off label" by obstetricians to slow or halt preterm contractions, it should not be used when the cervix has not dilated and there is no preterm labor, and that it should not have been administered for four weeks. In contrast, Dr. Giddens testified that it is safe to use Terbutaline for obstetrical patients, and that this was a common and accepted practice among obstetricians in cases like Barbara's.

Whether Terbutaline can cause cardiomyopathy, and whether it did cause Barbara's cardiomyopathy, was heavily disputed at trial. Dr. Murray, Barbara's treating cardiologist, agreed in his deposition, which was submitted into evidence, that peripartum cardiomyopathy is idiopathic, meaning the "pathogenesis is not known." In other words, idiopathic means that the etiology or medical cause of the condition is unknown. Dr. Murray agreed that diagnosis of the condition results from a "diagnosis of exclusion," which he said means that "one can find no other reason for the cardiomyopathy other than the fact that the woman was pregnant." In contrast, the Husses' primary causation expert, Dr. Frederick Carlton, Jr., testified that Terbutaline is known in the medical community to cause cardiomyopathy. Dr. Carlton opined that if Barbara had experienced shortness of breath out of proportion to what a

physician would expect in a late-term pregnancy "beginning a couple of months before [delivery]," such a fact "moves it less and less from just the idiopathic peripartum cardiomyopathy" and led him to believe that Terbutaline caused or contributed to Barbara's heart and lung conditions. It was significant to him that the medical records from Barbara's readmission on May 10, 1998, reflected her statements that she had suffered from severe shortness of breath for about two months before the birth of Hannah.

Other experts testified that, while the causes of peripartum cardiomyopathy are unknown, risk factors include multiple pregnancies, excessive weight gain during pregnancy, smoking, and toxemia. Barbara exhibited all of these by the end of her pregnancy.[3] Defendants sought to elicit testimony from their expert, Dr. Reddix, that medical literature relied upon by Dr. Carlton in forming his opinion does not show a causative relationship between Terbutaline and cardiomyopathy. The magistrate judge did not permit Dr. Reddix to state this opinion, as this was "outside the area of his expertise." On the final day of trial, following the cross-examination of defendants' last expert witness, Dr. Martin Tucker, the magistrate judge quipped in the presence of the jury: "Redirect? His meter is running."

The parties agreed that Tennessee's substantive law of medical malpractice governed. The Husses sought to recover on theories of negligence in administering Terbutaline and a lack of informed

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[3] Other risk factors which 3 Barbara did not exhibit include age over 30 years, and African-American race.

consent—reasoning that if Barbara had been informed of the risks of Terbutaline, she would not have consented to treatment with that drug. Defendants objected to the informed consent instruction on the basis that in Tennessee, the theory does not apply between a physician prescribing therapeutic drugs and a patient. The objection was overruled, and the instruction was given to the jury.

During closing argument, the Husses' attorney said the defendants did not produce medical literature to support their arguments. Defendants' counsel objected to this as a mis-characterization of events at trial. The magistrate overruled the objection because "[t]his is counsel's view of the matter." Ultimately, the jury rendered a general verdict. On a hand-written piece of note paper, the jury found for Barbara Huss and awarded her $3,500,000. The jury also found for Rodney Huss but awarded him no damages. The court entered judgment on the verdict. The defendants filed a motion for judgment as a matter of law, or in the alternative, for a new trial. This was denied.

The defendants appealed, arguing that: (1) the Husses' claims are barred by the statute of limitations, (2) there is insufficient evidence to prove that Terbutaline caused Barbara Huss's injuries, (3) the magistrate judge improperly excluded portions of Dr. Reddix's testimony regarding causation, (4) there were errors in the jury charge, (5) the judge's comment about Dr. Tucker's "meter" was prejudicial, and (6) the judge failed to correct a mischaracterization of the evidence by the Husses' counsel during closing arguments.

III.

The basis of the trial court's jurisdiction was diversity of citizenship. The Husses are citizens of Mississippi, defendants are citizens of Tennessee, and the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332.[4] In diversity cases, we apply federal procedural and evidentiary rules, and the substantive laws of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Under the *Erie* doctrine, federal courts apply the statute of limitations that the forum state would apply. *See Guar. Trust Co. v. York*, 326 U.S. 99, 109-10 (1945). We also apply the forum state's choice of law rules. *See Denman v. Snapper Div.*, 131 F.3d 546, 548 (5th Cir. 1998). This may require applying one state's statute of limitations and another state's substantive law. *See, e.g., Boardman v. United Svcs. Auto. Ass'n*, 470 So. 2d 1024, 1031 (Miss. 1985) ("[T]he law of a single state does not necessarily control every issue in a given case."). This case was tried in Mississippi. The court applied Mississippi's medical malpractice statute of limitations, and instructed the jury according to Tennessee medical malpractice law. The parties never objected to this choice of law. On appeal, the parties have briefed limitations under Mississippi law, and briefed sufficiency of the evidence and propriety of the jury instructions under Tennessee law.

Even had either party preserved an objection to this choice of law, which the parties plainly did not, *see Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74

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[4] The parties consented to have this case tried by 4 a magistrate judge. *See* 28 U.S.C. § 636(c). We have appellate jurisdiction pursuant to 28 U.S.C. § 1291 and § 636(c)(3).

(5th Cir. 1987), we are confident that it was proper to apply Mississippi's statute of limitations and Tennessee's law of medical malpractice. Mississippi courts generally treat statutes of limitations as procedural and thus apply domestic limitations periods. *See Allison v. ITE Imperial Corp.*, 928 F.2d 137, 144 (5th Cir. 1991); *cf. Williams v. Taylor Mach., Inc.*, 529 So. 2d 606, 609 (Miss. 1988), *superseded on other grounds by statute*, Miss. Laws, ch. 486, § 17.05 (1987), *as recognized in S. Pac. Transp. Co. v. Fox*, 609 So. 2d 357, 361-62 (Miss. 1992).[5] In matters of substantive tort law, Mississippi follows the "center of gravity" test of the Restatement (Second) of Conflicts of Law, under which a court applies the law of the state with the most substantial contacts with the parties and the subject matter of the action. *See Mitchell v. Craft*, 211 So. 2d 509, 515 (Miss. 1968) (citing Restatement (Second) of Conflicts of Law § 145). A court must consider the place of injury, the place where the negligent conduct occurred, the domicile or residence of the parties, and the place where the parties' relationship is centered. *Price v. Litton Sys., Inc.*, 784 F.2d 600, 603 (5th Cir. 1986) (citing *Mitchell*, 211 So. 2d at 515).

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[5] Mississippi courts treat foreign statutes of repose as substantive, and observe limitations imposed by such statutes. *See Wayne v. Tenn. Valley Auth.*, 730 F.2d 392, 400-02 (5th Cir. 1984) (holding that, while Mississippi courts typically apply domestic statutes of limitations, Tennessee's 10-year statute of repose applied to cut off plaintiffs' right of action). Because the Husses filed suit within the three-year period of Tennessee's medical malpractice repose statute, this exception is not implicated. *See* TENN. CODE ANN. § 29–26–116(a)(3) (2006 supp.).

The defendants reside in Tennessee, and the parties' relationship was centered in Memphis. The breach of the standard of care, if any, occurred at the Memphis OB/GYN clinic, where Barbara was administered subcutaneous Terbutaline and prescribed oral Terbutaline. On the other hand, the Husses reside in Mississippi, and Barbara has suffered harm chiefly in that state. On balance, we believe that the "center of gravity" in this case is in Tennessee, and that Mississippi does not have a more significant relationship to the case. *See, e.g.*, *Bledsoe v. Crowley*, 849 F.2d 639, 642-43 (D.C. Cir. 1988) (applying Restatement and holding that where patient-physician relationship was based in Maryland, Maryland law applied to D.C. resident's medical malpractice claim); *cf. Denman*, 131 F.3d at 549 ("Under Mississippi law, the substantive law of the place of injury controls unless another state has a more significant relationship to the occurrence and the parties.") (citation omitted).

IV.

Because the limitations issue was potentially dispositive, this panel initially addressed that issue. A panel majority held that, as a matter of federal procedural law, defendants had preserved the argument that they were entitled to judgment as a matter of law. *Huss I*, 465 F.3d at 205 ("There was no jury question submitted concerning the date the Husses' cause of action accrued; therefore, defendants can prevail on their statute of limitations defense only if the Husses' claims accrued before June 30, 1998 as a matter of law."). The panel then held that, under Mississippi law, Barbara knew or should have known of a connection between the defendants' conduct and her injuries on the day she

was diagnosed with cardiomyopathy, May 10, 1998. *Id.* at 207-08 (citing *Wright v. Quesnel*, 876 So. 2d 362, 367 (Miss. 2004)). In light of the fact that the Husses filed suit two years and forty days after this time, the majority held that the Husses' claims were time-barred as a matter of law under Mississippi's medical malpractice statute of limitations. *Id.*; *see* MISS. CODE ANN. § 15–1–36.[6] The majority vacated the jury's verdict and rendered judgment in defendants' favor. *Huss I*, 465 F.3d at 208-09. Judge Higginbotham dissented.

The Husses requested rehearing en banc. This failed: a majority of the judges in active service and not disqualified did not vote in favor of granting rehearing en banc. *Huss II*, 2006 WL 5013195, at *1. However, the panel *sua sponte* granted rehearing by the panel. *Id.* The Mississippi Supreme Court subsequently issued its opinion in *Sutherland v. Ritter*, 959 So. 2d 1004 (Miss. 2007). A majority of this panel concluded that no case of the Mississippi Supreme Court was clearly controlling. *See Huss III*, 508 F.3d at 245-48. The panel majority requested

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[6] The statute provides in relevant part:

> [N]o claim in tort may be brought against a licensed physician [or] hospital . . . for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

§ 15–1–36(1), (2). While a statutory change took effect for claims accruing on or after July 1, 1998, the change does not affect the issues presented in this case. *See id.*

that the Mississippi Supreme Court accept the following certified question:

> When the alleged negligence is (1) administration of a drug by a physician, or (2) failure to disclose what a reasonable practitioner would have disclosed about the risks of a drug, and experts disagree as to whether the drug caused the plaintiff's injuries, is the date that the alleged act, omission or neglect might, with reasonable diligence, have been first known or discovered by the plaintiff the date her condition or illness is diagnosed by non-defendant physicians or experts, or the date the pertinent facts are available in medical records, or is limitations tolled until one in a series of physicians or other experts the plaintiff consults first tells her that the drug caused her condition or illness?

Id. at 241-42. Judge Higginbotham dissented from certification. *Id.* at 248-55 (Higginbotham, J., dissenting).

The Mississippi Supreme Court accepted the certified question. The Supreme Court's response—that the Husses' claims are not prescribed a matter of law—has resolved the limitations issue, and we vacate our prior disposition of this and hold that the magistrate judge properly denied defendants' motion for directed verdict on limitations grounds. The panel necessarily retains jurisdiction of the remainder of the issues raised by the defendants in this appeal. The five other points of error asserted by defendants are: sufficiency of evidence to establish causation, the ruling on Dr. Reddix's expert

testimony, prejudicial comments by the magistrate judge, the correctness of the jury instructions, and mis-characterization of evidence during closing argument.

V.

We now take up the argument that the magistrate judge erred in striking portions of the testimony of the defendants' causation expert, Dr. Reddix. We hold that the magistrate judge erred in prohibiting Dr. Reddix from expressing opinions on medical causation, and that such error was not harmless.

A.

State law governs the substance of this case, but "the Federal Rules of Evidence control the admission of expert testimony." *Mathis v. Exxon Corp.*, 302 F.3d 448, 459 (5th Cir. 2002).[7] Experts qualified by "knowledge, skill, experience, training or education" may present opinion testimony to the jury. FED. R. EVID.702. "A party seeking to introduce expert testimony must show '(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.'" *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224, 227 (5th Cir. 2007) (quoting FED. R. EVID. 702). The trial courts act as "gate-keepers" which make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can

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[7] The parties' briefing of admissibility of expert testimony under Tennessee law is therefore not relevant.

be applied to the facts in issue." *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243-44 (5th Cir. 2002) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993)).

Whether an individual is qualified to testify as an expert is a question of law. *Mathis*, 302 F.3d at 459 (citing FED. R. EVID. 104(a)). However, we review the admission or exclusion of expert testimony for an abuse of discretion. *See St. Martin v. Mobil Exploration & Producing U.S. Inc.*, 224 F.3d 402, 405 (5th Cir. 2000). "A district court should refuse to allow an expert witness to testify if it finds that the witness is not qualified to testify in a particular field or on a given subject." *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999). Rule 702 does not mandate that an expert be highly qualified in order to testify about a given issue. Differences in expertise bear chiefly on the weight to be assigned to the testimony by the trier of fact, not its admissibility. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 782 (3d Cir. 1996) (reasoning that "most arguments about an expert's qualifications relate more to the weight to be given the expert's testimony than to its admissibility"). Rulings are subject to harmless error analysis, under which an incorrect ruling will be affirmed unless it affected a substantial right of the complaining party. *See St. Martin*, 224 F.3d at 405.

B.

Defendants designated Dr. Reddix as an expert witness. Dr. Reddix has a medical degree, a master's degree in public health, and is board-certified in internal medicine. At the time of trial he had fifteen years of experience as an internist. He stated that he had knowledge of cardiac conditions and toxicology from medical school and his training as an internist. He had treated pregnant patients, and had treated patients with heart diseases, cardiomyopathy, and pulmonary edema. Defendants' counsel asked Dr. Reddix whether he had studied Barbara's medical records and the medical literature relied upon by the Husses' experts; Dr. Reddix said he had. Counsel then asked whether he had an opinion, "based upon reasonable medical probabilities and your education, training, and experience as a physician, as well as your review of the materials I just read, as to whether or not Terbutaline caused or contributed to the cardiomyopathy suffered by Barbara Huss?" The Husses' attorney objected on the basis that Dr. Reddix had stated in his Rule 26 report that he did not know the cause of Barbara's cardiomyopathy because the condition is idiopathic.[8]

The magistrate judge requested that the attorneys discuss the objection outside the presence

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[8] Contrary to the objection made by the Husses' counsel, Dr. Reddix said in his expert report that Barbara's cardiomyopathy "cannot be said to have been caused . . . by the administration of oral Terbutaline." The report has detailed criticism of the medical literature on which the plaintiffs' experts relied. Dr. Reddix also attaches a study involving 9,000 patients in which few, if any, had cardiomyopathy.

of the jury. In chambers, the following exchange occurred:

> The Court: Now, on what basis is this witness qualified to offer any opinion about whether administering Terbutaline did or did not cause cardiomyopathy here?
>
> Defendants' Counsel: He's an internal medicine physician who treats patients with cardiomyopathies. He has a degree from Harvard in Public Health, including studying statistics. He's reviewed the medical literature. I mean, he has patients all the time who have cardiomyopathy. He knows the drug interactions.
>
> The Court: I don't know about that last statement. I'm inclined to think this is outside the area of his expertise.

Focusing on Dr. Reddix's lack of "experience or training" which would "enable[] him to say that the administration of this drug did or did not probably cause cardiomyopathy," the magistrate judge sustained the objection. The magistrate judge did not focus on whether the opinion was beyond the scope of the opinions set forth in Dr. Reddix's Rule 26 report.

Following this ruling, defendants' counsel asked Dr. Reddix outside of the presence of the jury to state in narrative form the basis for his opinion that Terbutaline did not cause or contribute to Barbara Huss's cardiomyopathy. Dr. Reddix said: "Basically, there's no established evidence that has been tested and published in major journals or the [Physician's Desk Reference] that it causes cardiomyopathy."

Counsel then asked "what in the medical records caused you to believe that Terbutaline is not the causative agent?" Dr. Reddix said one could not deduce a causative relationship because the articles relied on by the Husses' experts had very small sample sizes, and additionally, some articles may have confused pulmonary edema with cardiomyopathy. By contrast, Dr. Reddix was prepared to testify based upon a study of 9,000 patients who took Terbutaline and did not develop cardiomyopathy.[9] The thrust of the proffered testimony was that Terbutaline could not be said to be the cause of Barbara's cardiomyopathy, and that the cause of her condition could not be determined, *i.e.*, the condition is idiopathic. Following the proffer, the jury returned to the courtroom. The magistrate judge explained to the jury: "I have sustained an objection to the opinion Dr. Reddix was requested to express on the ground that it was outside the field of his expertise." Defendants then called their next witness.

After trial, defendants moved for a new trial in part due to the allegedly erroneous exclusion of Dr. Reddix's testimony. The magistrate judge denied this motion in a written order, reasoning:

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[9] Dr. Reddix testified in part:

> [M]any of the articles that they talk about were very, very small studies. And the possibility of chance occurrences were very high. When you had four people out [of] 16, where it only occurs in one in 5,000 to 10,000 patients. So a lot of times the journals that were listed [by the Husses' experts] also confused what was said about pulmonary edema as a part of the problem, which would lead to a cardiomyopathy in any of those studies.

> Dr. Reddix's resume . . . reveals the deficiencies in Dr. Reddix's background and experience insofar as a causation expert in this case is concerned. Dr. Reddix has virtually no experience in obstetrics and gynecology and no experience whatsoever with Terbutaline. Since 1991, Dr. Reddix's employment has primarily been as a staff physician for the Job Corp [sic], the Student Health Center of Jackson State University, and the Hinds County Detention Center. There is simply nothing in Dr. Reddix's background which entitled him to express opinions as to whether Terbutaline caused the plaintiff's cardiomyopathy or whether the cardiomyopathy was idiopathic.

Defendants note that Dr. Reddix had a medical degree, was board-certified in internal medicine, practiced internal medicine for fifteen years, treated patients with heart conditions—some of whom were pregnant, was "familiar with the term cardiomyopathy," treated patients with enlarged hearts and cardiomyopathy, and prescribed drugs similar to Terbutaline. Moreover, "Dr. Reddix's anticipated testimony was a natural extension of his medical and public health training and his experience as a practicing physician of fifteen years." Defendants posit that this qualified Dr. Reddix to opine that the medical literature and Barbara's records did not allow one to infer that Terbutaline causes cardiomyopathy, or that it caused it in Barbara's case. Defendants say Dr. Reddix was at least as qualified to give causation testimony as was Dr. Carlton, the Husses' main expert on causation. Defendants argue that the ruling was prejudicial

because it prevented them from challenging the Husses' causation testimony and Dr. Carlton's characterization of the medical literature.

The Husses note that Dr. Reddix was neither a cardiologist nor a toxicologist. Relying on *Tanner v. Westbrook*, 174 F.3d 542 (5th Cir. 1999), *superseded in part by rule on other grounds*, FED. R. EVID. 103(a) (2000), *as recognized in Mathis*, 302 F.3d at 459 n.16, the Husses argue that Dr. Reddix could not have provided competent testimony about whether a particular heart condition (cardiomyopathy) can be, or in Barbara's case, was caused by a particular drug (Terbutaline). The Husses also aver that even if the ruling was wrong, defendants did not suffer prejudice because other experts presented similar opinions to those Dr. Reddix was prepared to express, except for the claim that the studies relied on by Dr. Carlton are illogical.

C.

We believe that the exclusion of Dr. Reddix's opinion testimony was an abuse of discretion. Dr. Reddix reviewed Barbara's records and the medical literature relied on by the Husses. Through Dr. Reddix's testimony, the defendants sought primarily to discredit the contention that Terbutaline is a known cause of cardiomyopathy, and consequently, that Terbutaline more likely than not caused Barbara's cardiomyopathy. Dr. Reddix did not need to be board-certified in cardiology or toxicology to explain that the studies relied on by the Husses do not prove a causative relationship—especially given the very small number of patients in those studies. Dr. Reddix's training and experience as a medical professional qualify him to tell the jury why the

literature does not establish a causal link. Moreover, Dr. Reddix identified a study of over 9,000 people which tended to undermine the Husses' claims. In short, Dr. Reddix's education and knowledge allowed him to form a reliable opinion as to whether, as a general matter, Terbutaline causes cardiomyopathy.

We think that the more general nature of Dr. Reddix's conclusions helps to distinguish the present case from *Tanner*. There, all experts agreed as a general matter that birth asphyxia can cause cerebral palsy. 174 F.3d at 548. The issue was more specific: whether the defendants' failure to properly treat a newborn baby's birth asphyxia caused the baby's cerebral palsy, or whether the cerebral palsy was caused by another event. *See id.* at 547-48. We held that it was erroneous to admit an expert's opinion that the defendants' actions led to the baby's cerebral palsy when the medical literature did not support this theory of causation, the expert had not examined the baby, and the expert also had no personal experience that would validate his theory. *Id.* at 548.

In this case, the parties fought mainly over whether Terbutaline can cause cardiomyopathy. The Husses' expert, Dr. Carlton (who is a toxicologist, not a cardiologist), relied on this general premise when opining that Terbutaline caused Barbara's cardiomyopathy. Dr. Carlton explained that he formed his opinion in part by exclusion. Specifically, he believed Terbutaline was the culprit because he could not identify or think of any other reason that Barbara would develop cardiomyopathy. The main purpose of Dr. Reddix's opinion was to rebut an untenable conclusion. Dr. Reddix's knowledge qualified him to tell the jury that Dr. Carlton's

inferential leap was unsupported by medical literature, and that in his judgment, Barbara's peripartum cardiomyopathy was idiopathic. We do not think that Dr. Reddix needed to be specialized in cardiology or toxicology to act as a counterpoint to the Husses' experts.

The magistrate judge focused on the fact that Dr. Reddix had less training and experience with Terbutaline than Dr. Carlton. This missed the purpose for which defendants sought to elicit Dr. Reddix's opinion. Moreover, the *Daubert* standards are flexible, and the most important question is not whether one party's expert is more qualified than the other's, but rather, whether an expert's testimony is reliable. *See id.* at 547. We believe that there were sufficient indicia in this case that Dr. Reddix would provide a reliable opinion in rebuttal to Dr. Carlton's opinion. We disagree with the magistrate judge's conclusion that there is "nothing in Dr. Reddix's background which entitled him to express opinions as to whether Terbutaline caused the plaintiff's cardiomyopathy or whether the cardiomyopathy was idiopathic." *Cf. Holbrook*, 80 F.3d at 782 ("The court's mistaken approach restricted Dr. Carpenter's testimony based on a requirement that the witness practice a particular specialty to testify concerning certain matters."). The ruling was an abuse of discretion.

We also believe that this error prejudiced the defendants. The crux of this case was whether Terbutaline causes cardiomyopathy. The magistrate judge's ruling prevented the defendants from demonstrating that the Husses relied on medical literature which was unreliable, anecdotal, and contradicted by other studies. The Husses insist the

defendants were not prejudiced because the defendants' other witnesses disclaimed a causal link between the drug and Barbara's condition. However, none of the other witnesses gave the level of detail that Dr. Reddix would have presented, nor did the witnesses testify about studies showing no link between Terbutaline and cardiomyopathy. The exclusion was not harmless error. In a close case such as this, Dr. Reddix's testimony would "have added information that, if the jurors found it credible, might have been determinative" of the difficult causation questions. *See Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 553 (5th Cir. 2000). We hold that the exclusion was reversible error, and defendants are entitled to a new trial on this basis.

VI.

We now turn to defendants' argument that they are entitled to judgment as a matter of law or a new trial because the Husses did not establish the causation element of their medical malpractice claim. After trial, defendants moved for judgment as a matter of law, or in the alternative, for a new trial. The magistrate judge denied the motion because the Husses' experts testified that "Terbutaline is reported in some medical literature as a cause of cardiomyopathy." After reviewing the record, we have misgivings about whether the evidence allows a reasonable trier of fact to find that Terbutaline caused or contributed to Barbara Huss's conditions. However, defendants failed to adequately preserve this argument. Because we cannot render judgment on this basis, we pretermit a full discussion of the sufficiency of the evidence. Nevertheless, some observations about the causation evidence are intended to aid the parties and court on retrial.

A.

"A directed verdict is appropriate only if, after considering all the evidence and drawing all inferences therefrom in favor of the non-moving party, the court is convinced that no reasonable jury could find in favor of the non-movant." *Pimental v. LTD Canadian Pac. Bul*, 965 F.2d 13, 15 (5th Cir. 1992); *see* FED. R. CIV. P. 50(a). When reviewing the denial of a motion for a directed verdict or for judgment notwithstanding the verdict, we reverse only if "there was no conflict in substantial evidence such that reasonable minds could differ." *Horton v. Buhrke, Div. of Klein Tools, Inc.*, 926 F.2d 456, 459 (5th Cir. 1991); *see also Daubert*, 509 U.S. at 596 ("[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment[.]"). We review sufficiency differently depending on whether the issue was preserved at trial. *See Polanco v. City of Austin*, 78 F.3d 968, 973 (5th Cir. 1996). If the issue was preserved, we ask whether substantial evidence supported the verdict. *See McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 671 (5th Cir. 1993). If the issue was not preserved, we ask whether any evidence supported the verdict. *See Polanco*, 78 F.3d at 974. Sufficiency of the evidence is preserved by raising the issue in a motion at the close of all of the evidence. *See id.* at 973. "Even if no evidence supports the verdict, this Court lacks the power to enter judgment for the appellant. Instead, appellate relief is limited to ordering a new trial." *McCann*, 984 F.2d at 671.

Defendants failed to raise causation at the close of all of the evidence. The Husses urge us to consider the issue forfeited. Defendants concede that they did not raise the issue at the close of all of the evidence, but argue that we should excuse their failure and determine whether substantial evidence supported the verdict. In the past, we have construed the preservation requirements of Rule 50 liberally—but we have insisted that we may not simply ignore the Rule. *See, e.g., Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 472-73 (5th Cir. 2000). We ask whether the departure from the Rule was "de minimis" and whether the Rule's purposes were fulfilled. *See Polanco*, 78 F.3d at 974-75. The purposes are two-fold: "to enable the trial court to re-examine the sufficiency of the evidence as a matter of law if, after verdict, the court must address a motion for judgment as a matter of law, and to alert the opposing party to the insufficiency of his case before being submitted to the jury." *MacArthur v. Univ. of Tex. Health Ctr. At Tyler*, 45 F.3d 890, 897 (5th Cir. 1995).

Defendants challenged the sufficiency of the evidence at the close of the Husses' prima facie case. The magistrate did not reserve judgment, but immediately denied the motion. Approximately one day elapsed between the close of the Husses' evidence and the close of the defendants' evidence. During that time, defendants elicited causation testimony (albeit with portions of Dr. Reddix's opinion erroneously excluded). At the close of their case, defendants failed to renew the motion for a directed verdict. In similar circumstances, we have not excused non-compliance of this kind as "de minimis." *See McCann*, 984 F.2d at 672. Therefore,

defendants would at most be entitled to a new trial. *See id.* at 671. Because we have already concluded that a new trial is necessary due to the erroneous exclusion of testimony, we need not rule on the sufficiency of the evidence. However, some observations about the evidence may aid the parties on retrial.

B.

To establish a claim for medical malpractice in Tennessee, a plaintiff must show, by a preponderance of evidence, that the defendant breached the standard of care, and that the breach proximately caused the plaintiff's injuries. TENN. CODE ANN. § 29–26–115(a) (Supp. 2006); *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598-99 (Tenn. 1993). The Tennessee Supreme Court counsels that causation "is a matter of probability, not possibility, and in a medical malpractice case, such must be shown to a reasonable degree of medical certainty." *Kilpatrick*, 868 S.W.2d at 602. Thus, a plaintiff must show that: (1) there is a known medical nexus between the conduct and the harm suffered, and (2) the physician's conduct—and not an independent factor—more likely than not caused the injury. *See id.* In toxic tort and negligent prescription cases, these two facets of causation are often referred to, respectively, as general and specific causation. *See McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1239 (11th Cir. 2005); *Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 252 n.1 (2d Cir. 2005) (explaining the distinction between "general" and "specific" causation and recognizing that a failure to prove either undermines a negligence claim).

The Husses relied primarily on the expert testimony of Dr. Carlton to establish causation. *See Stokes v. Leung*, 651 S.W.2d 704, 706 (Tenn. Ct. App. 1982) ("[I]n medical malpractice cases, negligence and causation are ordinarily required to be proved by expert medical testimony."). Dr. Carlton opined that Terbutaline is a "known cause" of cardiomyopathy, and that it more likely than not caused or contributed to Barbara's development of cardiomyopathy. In other words, he testified to both "general" and "specific" causation. This testimony lacked an adequate basis in science or fact.

Major sources of medical literature, *e.g.*, the Physicians' Desk Reference and reports from Terbutaline manufacturers, provide a list of risks associated with Terbutaline; cardiomyopathy is not among them. Dr. Carlton's statement that Terbutaline is a "known cause" of cardiomyopathy relies mainly on a single study. *See* Judith U. Hibbard, M.D., *Chronic Terbutaline Therapy and Peripartum Cardiomyopathy: A Case-Control Study*, 15(2) HYPERTENSION IN PREGNANCY 183 (1996) ("the Hibbard study"). The Hibbard study observed that four out of fifteen peripartum cardiomyopathy patients, or 26.7%, at a Chicago hospital received Terbutaline as a tocolytic. The study shows temporal proximity between administration of Terbutaline and development of cardiomyopathy in four women. The study compares these four women with a control group of sixty women who did not develop cardiomyopathy. Only three patients in the control group took Terbutaline. The study did not investigate how frequently cardiomyopathy occurred in all Terbutaline users. As Dr. Reddix noted in his proffered testimony, the

study's small sample size creates a risk that unjustified conclusions were drawn from scant data and chance occurrences.[10] Dr. Carlton insisted that the Hibbard study's case-control method was "the best way to arrive at an answer." The study concludes that long-term use of Terbutaline is "positively associated with peripartum cardiomyopathy." *Id.* at 189. The study warns: "Caution should be exercised in understanding that the case-control design *does not provide a causative relationship* between the use of oral [Terbutaline] therapy and cardiomyopathy." *Id.* (emphasis added).

Dr. Carlton testified about other reports, none of which say Terbutaline causes cardiomyopathy. Vague statements that a drug led to "cardiovascular complications" or even death do not show general causation for the conditions at issue. Likewise, anecdotes detailing individual patients' experiences when taking the drug, such as chest pain, fall short of providing scientifically reliable evidence applicable to all other patients. Dr. Carlton drew an analogy between Terbutaline and other drugs in its family, called sympathomimetics. Cocaine and amphetamines are in this family, and to some extent, "they all tend in one way or another to rev the individual up." Dr. Carlton said that one "can

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[10] The women who developed cardiomyopathy were more likely to have smoked, drunk alcohol, abused cocaine, and used narcotics during pregnancy. *Id.* at 185-86. Of the cardiomyopathy patients, 14 of 15 (or 93.3%) were African-American. One was Hispanic. The average age was over 30. While 20.0% of the cardiomyopathy patients had preeclampsia, only 3.3% of the control group did. *Id.* As noted above, smoking, African-American race, age over 30, and toxemia/preeclampsia are recognized risk factors of peripartum cardiomyopathy.

assume that drugs in a particular class have similar effects and side effects," and that sympathomimetics can lead to cardiomyopathy as a "potential complication." However, Dr. Carlton did not indicate whether this theory has been accepted in the scientific community or tested via the scientific method. On cross-examination he acknowledged that sympathomimetics can have dissimilar effects. Dr. Carlton's theory regarding similarities between cocaine and Terbutaline provides no support for what is in essence a scientifically untenable thesis.

The medical link between Terbutaline and cardiomyopathy is too tenuous to support causation "to a reasonable degree of medical certainty." *See Kilpatrick*, 868 S.W.2d at 602; *cf. Dubois v. Haykal*, 165 S.W.3d 634, 638-39 & n.3 (Tenn. Ct. App. 2004) (holding that defendants were not entitled to summary judgment on causation because plaintiff presented peer-reviewed scientific studies showing that drug prescribed to her reduced efficacy of oral contraceptives). As the Eleventh Circuit's decision in *McClain* cogently explains, courts must not allow evidence of temporal correlation to serve as a substitute for science-based causation evidence:

> [S]imply because a person takes drugs and then suffers an injury does not show causation. Drawing such a conclusion from temporal relationships leads to the blunder of the *post hoc ergo propter hoc* fallacy. The *post hoc ergo propter hoc* fallacy assumes causality from temporal sequence. It literally means "after this, because of this." BLACK'S LAW DICTIONARY 1186 (7th ed. 1999). It is called a fallacy because it makes an assumption

> based on the false inference that a temporal relationship proves a causal relationship.

401 F.3d at 1243. Here, the Husses presented evidence of statistical correlation between use of Terbutaline and peripartum cardiomyopathy. Any scientist or statistician must acknowledge, however, that correlation is not causation. Moreover, peripartum cardiomyopathy is typically regarded as an idiopathic condition: the medical community has a poor understanding of what causes it. Consequently, a plaintiff who insists that a drug, not another factor, caused the disease faces a high burden in proving general causation. A plaintiff must present more than a single study showing correlation, accompanied by unrelated anecdotes and quasi-scientific musings about how a class of drugs affects the human body. However, that is what the Husses presented at trial.

It is axiomatic that causation testimony is inadmissible if an expert relies upon studies or publications, the authors of which were themselves unwilling to conclude that causation had been proven. *See, e.g.*, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 145-46 (1997) (studies did not support experts' conclusion that PCB exposure caused cancer because the doctors who conducted the studies were unwilling to draw that conclusion); *Vargas v. Lee*, 317 F.3d 498, 501-02 (5th Cir. 2003) (two studies did not support conclusion that trauma causes fibromyalgia because authors of both studies determined that causation was not established); *McClain*, 401 F.3d at 1247-48 (studies did not authorize conclusion that combination of ephedrine and caffeine is dangerous because authors of studies indicated that causation was not proven). Strangely,

the parties did not request, and the court did not conduct, a *Daubert* hearing. However, *Daubert* "assigned the trial court a gatekeeper role to ensure [expert] testimony is both reliable and relevant." *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 194 (5th Cir. 2006). Upon retrial, such a hearing will be essential to the court's "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *See Daubert*, 509 U.S. at 592-93.

The Husses have identified no case, and we have found none, from Tennessee or elsewhere, finding that Terbutaline causes cardiomyopathy.[11] Courts must be arbiters of truth, not junk science and guesswork. *See id.* at 596-97. The general causation evidence marshaled at trial suggests speculation, not a reasonable degree of medical certainty. The parties and the trial court must carefully consider on retrial whether the Husses' assertions are scientifically

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[11] In *Richardson v. Miller*, 44 S.W.3d 1 (Tenn. Ct. App. 2000), the Court of Appeals declined to direct a verdict in favor of physicians sued for administration of Terbutaline as a tocolytic. *Id.* at 30-31. The plaintiff's expert opined that Terbutaline caused an artery to split in the plaintiff's heart, causing a heart attack. *Id.* at 31. The court accepted this testimony at face value, as it was based on the expert's medical experience and examination of the plaintiff. *Id.* In this case, however, Dr. Carlton did not examine Barbara, and he testified based on medical literature which does not prove the causal link. In the only reported Tennessee case in which a plaintiff alleged that Terbutaline led to cardiomyopathy, the Tennessee Court of Appeals affirmed the trial court's dismissal on limitations grounds. *Crawford v. Beatty*, 108 S.W.3d 877, 879-80 (Tenn. Ct. App. 2003).

reliable, or whether their theory of causation is supported by other evidence which was not presented or was not available at the time of the first trial. The court must also not conflate 'admissible' with 'sufficient': the say-so of an expert is not necessarily grounds to deny judgment as a matter of law. *See id.* at 596; *cf. Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005) ("A claim cannot stand or fall on the mere *ipse dixit* of a credentialed witness.") (citation omitted). Had defendants adequately preserved objections to the admissibility and sufficiency of causation evidence, judgment could be entered on this basis. *See Hodges*, 474 F.3d at 193 ("An appellate court, in deciding whether [judgment as a matter of law] should have been awarded, must first excise inadmissible evidence; such evidence 'contributes nothing to a legally sufficient evidentiary basis.'") (quoting *Weisgram v. Marley*, 528 U.S. 440, 454 (2000)). Given the procedural posture of this case, only a new trial is available.

Even if Terbutaline was a "known cause" of cardiomyopathy, there is scant evidence of specific causation, *i.e.*, that Terbutaline caused Barbara's cardiomyopathy and related conditions.[12] *See Kilpatrick*, 868 S.W.2d at 598-99. Dr. Carlton did not personally examine Barbara at any time, but believed that the drug caused her cardiomyopathy because "she was on Terbutaline. Terbutaline is a

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[12] The jury was only asked to return a general verdict. It may make more sense upon retrial to pose separate questions to the jury regarding each of the conditions allegedly caused by Terbutaline: peripartum cardiomyopathy, congestive heart failure, and pulmonary edema.

known cause. And you don't have any other explanation for why she would have developed it." *Post hoc ergo propter hoc.* Dr. Carlton also believed that Barbara was taking Terbutaline "basically up until delivery." She actually ceased taking the drug weeks before delivery. Barbara's medical records demonstrate a conspicuous absence of breathing problems in the weeks before delivery and during the four days she spent in the hospital at the time of Hannah's birth. Belabored breathing is a symptom of cardiomyopathy and congestive heart failure, both of which the Husses say Barbara developed weeks or months before Hannah's birth. Moreover, Barbara's history included attributes recognized by medical literature as risk factors for cardiomyopathy: four prior pregnancies, smoking, severe weight gain, gestational diabetes, and toxemia. If Dr. Carlton thought that Barbara did not possess these characteristics, his opinion was based on inaccurate facts. If he disregarded these characteristics and concluded that Terbutaline must have been the sole "culprit," his opinion borders on fantasy.

The observations about general and specific causation are not a part of the holding today. However, it is important to identify problematic aspects in the scientific and factual proof necessary to this case so that any shortcomings canbe properly addressed upon retrial.

VII.

We now turn to defendant's argument that the jury should not have been instructed on a theory of lack of informed consent. Because this case must be remanded for a new trial, our resolution of this issue will aid the parties and court in crafting the proper

jury instructions. "We review challenges to jury instructions for abuse of discretion." *Battle*, 228 F.3d at 554 (citing *United States v. Monroe*, 178 F.3d 304, 307 (5th Cir. 1999)). "A judgment will be reversed only if the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Id.* (citation omitted).

Over defendants' objection, the jury was instructed on the issue of informed consent under Tennessee law. Relying on *Cary v. Arrowsmith*, 777 S.W.2d 8 (Tenn. Ct. App. 1989), defendants aver that the instruction was improper because a "doctor is not liable for lack of informed consent in connection with therapeutic drug treatment." The nature of defendants' objection to this instruction is that the jury likely construed informed consent as a standalone claim, instead of focusing on the Husses' medical malpractice claim, which provides a sufficient remedy. The Husses disagreed. In support of the instruction, the Husses' attorney cited at trial *Mitchell v. Ensor*, 2002 WL 31730908 (Tenn. Ct. App. Nov. 18, 2002) (not reported). Defendants insisted that *Mitchell* was not designated for publication and is not binding precedent. Defendants moved post-verdict for a new trial on the basis that the informed consent instruction was prejudicial error. The magistrate judge did not consider *Cary* binding authority, and cited *Burroughs v. Magee*, 118 S.W.3d 323, 332-33 (Tenn. 2003), and *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 430 (Tenn. 1994), in holding that an informed consent instruction is proper in medical malpractice cases. On appeal, the Husses still argue that the informed consent instruction was consistent with their malpractice

claim, citing *Ashe v. Radiation Oncology Assocs.*, 9 S.W.3d 119 (Tenn. 1999).

To prevail in a lack of informed consent case, a patient must prove that the doctor "did not supply appropriate information to the patient in obtaining his informed consent to the procedure out of which plaintiff's claim allegedly arose . . . ." TENN. CODE ANN. § 29–26–118 (2006 supp.). The plaintiff must also prove that such failure to disclose constituted malpractice. *See Ashe*, 9 S.W.3d at 121 (citing TENN. CODE ANN. § 29–26–115). In *Cary*, relied on by defendants, a Tennessee Court of Appeals reasoned:

> The doctrine of lack of informed consent is based upon "battery." "If informed consent is not effectively obtained, the defendant's departure from the standard care is not negligence but *battery*. . . ." *Cardwell v. Bechtol*, 724 S.W.2d 739, 750 (Tenn. 1987) (emphasis supplied). "[I]f no battery can be shown, then the issue clearly emerges as one of malpractice." *Id.* at 751. A battery necessarily requires an unpermitted touching of the plaintiff by the defendant or by some object set in motion by the defendant.

777 S.W.2d at 21 (citation omitted). The court then discussed a Pennsylvania Superior Court case, *Boyer v. Smith*, 497 A.2d 646 (Pa. Super. Ct. 1985), before concluding that:

> the better rule is that a treating physician must obtain the patient's informed consent for the medical treatment of the patient and not for each component part of the treatment process. The patient has an adequate legal

> remedy, *i.e.*, a malpractice action sounding in negligence, for the injurious consequence of therapeutic drug treatment.

Cary, 777 S.W.2d at 21.

However, in *Ashe*, the Tennessee Supreme Court more recently clarified that informed consent cases and medical battery cases are not the same:

> A medical battery may typically occur when: (1) a professional performs a procedure that the patient was unaware that the doctor was going to perform; or (2) the procedure was performed on a part of the body other than that part explained to the patient (*i.e.*, amputation of the wrong leg). A lack of informed consent claim typically occurs when the patient was aware that the procedure was going to be performed but the patient was unaware of the risk associated with the procedure.

9 S.W.3d at 121 (citing *Blanchard v. Kellum*, 975 S.W.2d 522, 524 (Tenn. 1998)). The Tennessee Supreme Court noted that the plaintiff contended that she was not apprised of risks inherent in her treatment, and this rendered her consent to treatment invalid. *Id.* The pleading and proffer of such a factual scenario rendered an informed consent instruction proper in that case. *Id.* Notably, the Court did not limit its holding to cases involving surgical procedures, as opposed to therapeutic drug treatments, *see id.*, nor do we see reason to read a limitation into the Court's holding that is simply not there.

In light of this statement of the law by Tennessee's highest court, we do not believe that it was an abuse of discretion for the magistrate judge to instruct the jury on informed consent along with medical malpractice. The Husses raised lack of consent in the pretrial order. Barbara testified at trial that she was not informed of the risks associated with Terbutaline, and that she would not have consented to tocolysis with Terbutaline therapy had she been apprised of the risks of taking the drug. The instruction also comported with Tennessee's "objective approach" to informed consent. *See id.* at 123. In sum, the physician must warn the patient of "all significant perils." *Id.* at 124. The court may craft the proper instruction to the jury upon retrial.

VIII.

Lastly, defendants argued on appeal that the magistrate judge made a prejudicial comment about their expert's "meter" in the presence of the jury, and that counsel for the Husses made a prejudicial mischaracterization of the evidence during closing argument. We perceive no need to discuss the merit *vel non* of such issues, as the case must be retried.

IX.

We hold that the Husses' claims are not barred as a matter of law on limitations grounds; that the magistrate judge committed reversible error in striking portions of defendants' expert testimony; and that the magistrate judge did not abuse his discretion in instructing the jury on a theory of lack of informed consent. A new trial is ordered.

REVERSED and REMANDED.

PRISCILLA R. OWEN, Circuit Judge, concurring.

I join in all but part VI(B) of the foregoing opinion. While the scientific reliability of the evidence pertaining to causation presented by the Husses would merit scrutiny on remand if challenged, the issue was not pursued in this court.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting.

There is only one real issue in this case—whether the trial judge committed reversible error in excluding a part of the testimony of one of the defendant's expert witnesses.[1]

I cannot agree that the magistrate judge abused his discretion in refusing to allow Dr. Michael Reddix to express his opinion as to whether Terbutaline caused Barbara Huss' cardiomyopathy. Plaintiffs at trial objected that defense counsel's question invited Dr. Reddix to exceed his disclosure filed under Rule 26. Looking to a colloquy with the judge during a proffer of Dr. Reddix's testimony and to a post-verdict denial of a new trial, the majority holds that the ruling rested on a broader assessment of qualifications. Perhaps, but both grounds were sound. There was no abuse of discretion in excluding this particular expression of opinion on either ground, and one solid ground for an evidentiary decision is sufficient for our deferential review.

I

Our decision in *Tanner* binds this panel. It would have been error to allow Dr. Reddix to express an opinion regarding specific causation. The majority flips conformity to *Tanner* into reversible error. In

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[1] Two matters may be quickly put aside. Judge DeMoss writing for himself instructs the trial court on remand. I do not think this one judge exegesis is sound. Nor can I join the panel majority's statement that it need not decide the question of sufficiency of the evidence since the case is being remanded. The testimony of the Husses' expert witnesses was admitted without objection at trial. To question the sufficiency, on this record, is inexplicable.

Tanner we reversed a judgment for plantiffs where the trial court over objection allowed a medical doctor with general medical training to venture an opinion that doctors attending a childbirth caused the child to contract cerebral palsy. As in *Tanner*, Reddix sought to move in the latter part of his testimony to matters that "hinge[d] on . . . the depth of [his] knowledge of a complicated, specialized medical subject matter."[2] It was this move to which the plaintiff rightfully objected. Under *Tanner* it would have been reversible error to admit Reddix's opinion that Terbutaline was not the cause. After quoting the judge's explanations for excluding this part of Reddix's testimony, the majority repeats defense-supplied protests of Reddix's competence, but these arguments do not undermine the judge's salient observations regarding Reddix's thin training and experience on the relevant subjects. The weakness of the majority's position speaks from the pages of its decision.[3] Even if the matter could be argued both ways, there it must lie.

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[2] *Tanner v. Westbrook*, 174 F.3d 542, 547 (5th Cir. 1999) (reversing on grounds that a doctor's expert testimony was erroneously admitted, when it went beyond general standard of care and into specific causation issues on which he lacked relevant background knowledge or experience). *Tanner* was demanding of qualifications for plaintiffs' expert witnesses. It cannot be relaxed for defendants.

[3] The majority's counter argument to the magistrate judge essentially amounts to pointing out that Reddix was "familiar with the term cardiomyopathy," and had "prescribed drugs similar to Terbutaline." Plainly, these are inadequate challenges to a trial judge's exercise of discretion.

II

Dr. Reddix's expert report filed under Rule 26 stated that his opinion would be that cardiomyopathy was idiopathic. He gave this opinion to the jury without any objection. This accords with the core defense asserted at trial—that science did not know the cause of cardiomyopathy and hence the prescribing doctors could not have known. The trial court was well within its discretion in not allowing the witness to expand his testimony over plaintiffs' objection, from "it was not knowable" to "it was not a cause of injury." Nor did the objection come as a surprise. Defendants had on the eve of trial sought to expand Reddix's anticipated trial testimony beyond the filed Rule 26 Report but at the start of the trial the judge sustained plaintiffs' objection to the effort. It is not happenstance that defense counsel led the direct testimony first over the ground within the Rule 26 disclosure. This put before the jury Dr. Reddix's opinions that cardiomyopathy is idiopathic, the heart of the defense. Only then did defense counsel push the envelope of the trial court refusal to allow a last minute expansion of the report.

Huss' condition, Reddix's report opined, "cannot be said to have been caused, to a reasonable of [sic] medical certainty/probability, by the administration of oral Terbutaline. Postpartum cardiomyopathy occurs in a small number of women who are pregnant. Such condition is idiopathic in nature." At trial he sought to go further, to bridge the gap by eliciting an opinion that Terbulatine was not the cause. This crucial distinction underlies the ground for the objection, rightly sustained, at trial.

The majority claims that Dr. Reddix's "report has detailed criticism of the medical literature," but the full extent of this criticism is that the studies are "outdated," that they "often confuse pulmonary edema with cardiomyopathy," and that they use data from IV administration of Terbutaline when oral administration was at issue in Huss' case. Important points, but the critique is emphatically not detailed, nor is it damning. Most importantly, the latter two points were abundantly testified to at trial—and the former point was never proffered.[4] Nowhere does Reddix's report mention sample sizes or other statistical challenges to the general causation claims of the plaintiff's articles; as for the "study involving 9,000 patients," it was merely attached to the report, and the report offers no reference to it, commentary on it, or description of it whatsoever.[5]

Further, the defense never offered into evidence the article that Reddix referred to in his proffer, despite many points at which it could have done so.

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[4] The defense counsel said, in chambers: "Plaintiffs have 4 brought up pulmonary edema and tried to put it in the same intellectual wastebasket as cardiomyopathy and act like they're the same thing. It's important that he explains to the jury that they are not the same thing."

The judge's ruling, in reply, was: "Well, he did so. It took him forever to get around to it. But I'm not going to let him express an opinion as to whether the administration of this drug caused or did not cause the cardiomyopathy here."

[5] Even if it had been discussed in the report or in testimony, it would have affected little. The article is by no means a decisive refutation of the causal connection between cardiomyopathy and Terbutaline under the circumstances presented by Huss. The article did not involve a controlled experiment, nor were the factors relevant to Huss' case adequately accounted for in the data analysis.

The defense did not even try to seek admission. Defense expert Dr. Tucker, vastly more qualified than Reddix as to peer-reviewed medical literature and testifying immediately after the allegedly erroneous exclusion, was not asked about the article.[6] This despite the fact that Dr. Tucker did testify to a point at which the article would be relevant, if the majority here were correct: "I've never been able to find any relationship, a causal relationship between Terbutaline and cardiomyopathy. Granted, Terbutaline has other side effects, and we've talked about those. But as far as cardiomyopathy, I've never been able to find any causal relationship between the two." The defense never cross-examined plaintiff's witnesses using the article as the basis for challenge, even when it repeatedly would have been appropriate to do so. They did confront them with other articles and other medical literature on the specific causation and standard of care arguments, because these were the sites of actual conflict at trial. The defendant Dr. Gayden was directly challenged on causation, but he too never mentioned this article.

In sum, the defense did not offer freestanding statistical challenges, and Reddix's statistical observations were to support a causation conclusion that Reddix was rightly restricted from rendering. Reddix's partial exclusion was not an error, and certainly no abuse of discretion. Even if there were

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[6] Dr. Tucker was a manuscript reviewer for the American College of Obstetricians and Gynecologists, and he boasts an extensive list of research publications over the course of his career. He would thus have been imminently more qualified to critique the plaintiff's causation studies, had the defense actually been interested in mounting such a challenge.

error, any reasonable view of the defense case at trial yields the insight that it was not prejudicial to the defense case, which received ample airing at trial. The proffered testimony lacks coherence sufficient to persuade that its exclusion was prejudicial. The jury was already awash with testimony of both sides regarding specific causation, all admitted without objection and explained at length in direct and cross examination. And Dr. Reddix was followed by another defense expert who testified at length to conclude the case.

III

After erasing the Husses' jury verdict based on the district court's exclusion of a portion of Dr. Reddix's testimony, Judge DeMoss then includes nine pages of dicta "making observations" about the admissibility of the Husses' expert evidence, an issue plainly not before this court; this while finding reversible error in the district court's refusal to admit part of the testimony of a defense expert—which somehow escapes its volunteer *Daubert* examination. Neither Judge Owen nor myself join this part of the opinion on admissibility. Judge DeMoss' opinion itself acknowledges that the defendants waived any challenge to the admissibility of the Huss' expert evidence by not objecting before or during trial, despite the explicit warning in the pretrial order that all objections to depositions not submitted to the trial judge ten days prior to trial—including the video deposition of Dr. Murray that was played for the jury—are waived.[7] It also

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[7] *Pucket v. U.S.*, 556 U.S. __ (2009) ("If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the

acknowledges that the defendants failed to preserve a challenge to the sufficiency of the evidence, but never mentions that this failure restricts this court's review of the Huss' expert evidence to "whether the plaintiff has presented *any* evidence in support of his claim"[8]—a standard that beyond peradventure the Husses surpassed.

The uniform law of the circuits,[9] the Fifth included,[10] is that without a timely objection to the

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issue. If he fails to do so in a timely manner, the claim for relief from the error is forfeited. .. . If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed.").

[8] *Polanco v. City of Austin*, 78 F.3d 968, 974 (5th Cir. 1996).

[9] *U.S. v. Mornan*, 413 F.3d 372, 379 (3d Cir. 2005) ("Where a defendant fails to object to the admission of evidence (including expert testimony) during trial, this Court reviews the decision to admit that evidence for plain error."); *U.S. v. Gaskin*, 364 F.3d 438, 460 n.8 (2d Cir. 2004) ("Where a party questions whether sound scientific methodology provides a basis for an expert opinion, it may move to preclude the admission of the opinion. Gaskin made no such motion; instead, he stipulated to the admissibility of the expert opinion. Under such circumstances, he cannot complain on appeal that the opinion lacks foundation.") (internal citation omitted); *Mascenti v. Becker*, 237 F.3d 1223, 1231 (10th Cir. 2001) ("[W]e find no plain error such as to excuse a timely *Daubert* objection to plaintiff Mascenti's expert testimony. We are convinced that Defendant forfeited the opportunity to subject the expert testimony of Dr. Sullivan and plaintiff's other experts to a *Daubert* challenge by failure to make a timely objection before that testimony was admitted."); *C.B. Fleet Co. v. Smithkline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 437 (4th Cir. 1997) ("Fleet made no *Daubert* objection to admission of the extensive testimony of SmithKline's expert witnesses about the blue-dye tests' methodology, conduct, and results. Fleet

admission of expert evidence, appellate review is waived absent plain error. The unobjected-to evidence is competent and passes to the jury for credibility and weight determinations.[11]

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contends that it need not have: that its challenge here is not to the admissibility of this evidence but to its insufficiency when tested by *Daubert* principles to support the district court's finding of the tests' scientific reliability. That cannot be right."); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996) ("We conclude Pacific Lumber waived its *Daubert* objections to EPIC's scientific evidence of impaired breeding by failing to request a ruling on the admissibility of the evidence in the district court."); *Christopher v. Cutter Labs.*, 53 F.3d 1184, 1192 (11th Cir. 1995) ("If Armour believed that Dr. Robinson's testimony was statistically invalid, it should have objected to that testimony, giving him the chance to explain his answer. . . . Absent an objection, we can review the challenged evidence only for plain error."); *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1406–07 (8th Cir. 1994) ("We need not reach this issue, however, because JCI failed to object to Jacobson's testimony on the basis that he was not qualified as an expert or that he lacked a scientific basis for his opinions.").

[10] *See H.E. Stevenson v. E.I. DuPont De Nemours and Co.*, 327 F.3d 400, 406–07 (5th Cir. 2003) (DeMoss, J.); *SEC v. Snyder*, 292 F. App'x 391, 400 n.1 (5th Cir. 2008) ("Many of Snyder's arguments appear to be belated attempts to challenge the admissibility of Hoffman's opinions under Fed. R. Evid. 702 and *Daubert*, rather than challenges to the sufficiency of the evidence. Because Snyder did not object to the admissibility of Hoffman's testimony concerning the accounting practices at issue, that issue has been forfeited.") (internal citation omitted); *U.S. v. Bates*, 240 F.3d 1073, *3 (5th Cir. 2000) (unpublished) ("If the defendant fails to object to the expert's testimony, then the defendant 'waives appellate review absent plain error.'").

[11] Consider hearsay which is generally inadmissible on grounds of unreliability. However, if hearsay evidence is admitted into testimony without an objection, it is treated as competent evidence for the jury to weigh and on which to rest

IV

This case answers no scientific questions and sheds little of the light of science on its difficult medical problems. Able lawyers tried this case. This jury answered the questions the court and the lawyers put to it.

Defendants have had their day in three courts and, accepting as we do the answer by the Supreme Court of Mississippi to our certified question regarding limitations, have raised no other grounds of error which persuade me to disturb this jury verdict. To these eyes the court today oversteps its judicial role and in doing so produces grave error. In lowering the hurdle of *Tanner* for defendants it fails to treat plaintiffs and defendants with an even hand and in the process perversely invites the junk science it decries.

I would affirm.

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its verdict. *See Gochicoa v. Johnson*, 118 F.3d 440, 448 n.7 (5th Cir. 1997) ("Otherwise inadmissible hearsay admitted without objection is treated the same as any other evidence, and may be considered by the jury in support of its verdict.") (interpreting Texas law); *U.S. v. Spletzer*, 535 F.2d 950, 955 n.7 (5th Cir. 1976).

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI
DELTA DIVISION

BARBARA HUSS and RODNEY HUSS,
Plaintiffs

v.

JOHN OVERTON GAYDEN, M.D. and
MEMPHIS IN OBSTETRICS AND
GYNECOLOGICAL ASSOCIATION, P.A.,
Defendants

No. 2:00CV131-EMB

Entered: October 7, 2004

OPINION

This matter is before the court on defendants' Motion for Judgment as a Matter of Law or in the alternative, Motion for New Trial, pursuant to F.R.C.P. Rules 50(b) and 59(a). The court has considered the parties' memoranda in support of their positions and is prepared to rule.

Defendants' Motion for Judgment as a Matter of Law is based on the following grounds: (1) the jury's verdict is not supported by the substantial weight of the evidence produced at trial and would only have been the result of bias, passion or prejudice; (2) the jury should not have been allowed to consider the claim of informed consent; (3) plaintiff failed to produce sufficient proof regarding causation; and (4) the plaintiff's claims are barred by the applicable statute of limitations.

Defendants' Motion in the alternative for New Trial is based upon the reasons stated above, and additionally on the following grounds: (1) the exclusion of expert opinion testimony by Dr. Michael Reddix was an erroneous abuse of discretion; (2) the exclusion of certain expert and factual testimony by Dr. Martin Tucker and Dr. Andrea Giddens was improper; (3) defendants' proposed Instruction D-14 should have been given; (4) the jurors should have been selected from the Delta Division; (5) three of the eight jurors should have been excused for *cause*; (6) the damages awarded by the jury were excessive; and (7) the jury's verdict resulted from the improper exclusion of evidence *I* improper admission of other evidence, and prejudicial comments during trial which created bias against defendants.

F.R.C.P. Rule 50(a) (1) provides that a motion for judgment as a matter of law may be granted when "there is no legally sufficient evidentiary basis for a reasonable jury to find for the [non-movant] party on that issue .... F.R.C.P. Rule 50(a) (1). In deciding such a *motion l* the court "must consider all of the evidence in the light most favorable to the nonmovant, drawing all reasonable factual inferences in that *party'* s favor, and leaving credibility determinations and the weighing of the evidence to the jury." *Hughes v. Ford Motor CO' I* 204 F. Supp. 958 1 959 (N.D. Miss. 2002), *Johnson v. Baptist Memorial Hospital Center,* 2002 WL 31992186 (N.D. Miss. 2002). A motion for new trial pursuant to F.R.C.P. Rule 59(a) (1) based on evidentiary grounds should not be granted unless the verdict is against the great weight of the evidence. *Johnson,* at 2.

Motion for Judgment as a Matter of Law

At trial it was established that on May 6, 1998, Dr. Andrea Giddens, plaintiff's principal attending physician at Memphis Obstetrics and Gynecological Association, P .A. (Memphis OB-GYN), performed a caesarean section on Mrs. Huss for the delivery of her second child at Methodist-Germantown Hospital. Within hours following her discharge from the hospital, Mrs. Huss was readmitted to the hospital and diagnosed with a cardiomyopathy. Mrs. Huss contended that her cardiomyopathy and resulting health problems were the results of defendants' administering her the drug Terbutaline in violation of the applicable standard of care. Terbutaline was first administered to Mrs. Huss on March 8, 1998, on the instruction of defendant Dr. John Gayden, also a member of Memphis OB-GYN, when she complained of pressure and cramping and feared going into pre-term labor. Dr. Gayden did not examine Mrs. Huss on this occasion but rather relied on a telephone report from a nurse. Mrs. Huss was given two injections of Terbutaline at the hospital. She testified that she was told nothing about Terbutaline by the nurse who administered the drug to her. Dr. Gayden issued Mrs. Huss a prescription for Terbutaline the following morning when he was making rounds and did not inform her of any side effects or risks associated with Terbutaline. Dr. Gayden testified that Terbutaline, although not FDA approved for prevention of pre-term labor, was the most appropriate drug for such use and that there is no evidence Terbutaline causes cardiomyopathy. Dr. Gayden also testified that the standard of care did not require him to advise Mrs. Huss of the potential side effects or risks associated with of Terbutaline.

On March 20, 1998, while at a casino in Tunica, Mississippi, Mrs. Huss began complaining of pressure in her abdomen and difficulty breathing. An ambulance was dispatched to transport Mrs. Huss to the same hospital in Memphis in which she had been treated earlier that month. Records of the ambulance service indicate Mrs. Huss was administered oxygen and placed on her left side - to assist her breathing, she claimed. Mrs. Huss was seen by a nurse at the hospital, and it was determined that she was not having contractions. Mrs. Huss was seen again at the hospital on April 5, 1998, and a vaginal examination by the nurse revealed that she was not in pre-term labor. The hospital records do not indicate Mrs. Huss complained of difficulty breathing or that such was observed by the nurse.

Mrs. Huss, her husband, and a family friend testified that on Easter Sunday, April 15, 1998, Mrs. Huss left the dinner table because of the difficulty she was having breathing. She described it as gasping for breath. Later that month Mrs. Huss was seen by her internist for an ear infection, and at that time her blood pressure was slightly elevated. As her pregnancy progressed to term, Mrs. Huss had significant weight gain and high blood pressure. On May 5, 1998, Mrs. Huss 'was seen by Dr. Giddens at the Memphis Clinic and admitted to the hospital for delivery. When Dr. Giddens' effort to induce labor was unsuccessful, the caesarian section was performed. Mrs. Huss described her breathing as of May 5, 1998, as "horrible."

Plaintiff's claim that the standard of care was violated by giving her Terbutaline and that Terbutaline caused her cardiomyopathy was

supported by expert testimony from Drs. Rick Carlton and James Lewis, both of Jackson, Mississippi. Dr. Carlton, Board certified in Emergency Medicine, Internal Medicine and Toxicology, testified that in his opinion, based upon his review of Mrs. Huss' medical records and a history, Terbutaline caused or contributed to her cardiomyopathy, although the Physician's Desk Reference (PDR) does not state that Terbutaline causes cardiomyopathy. Dr. Lewis, a longtime OB-GYN practitioner, reviewed plaintiff's medical records and testified that in his opinion the defendants failed to adhere to the applicable standard of care when: (1) plaintiff was not examined by a physician prior to the injections of Terbutaline she was given on March 8, 1998; (2) plaintiff was not in preterm labor - mild contractions alone do not constitute pre-term labor; and (3) Terbutaline should not have been administered to her nor prescribed for use thereafter. Dr. Lewis also testified that failing to obtain the plaintiff's informed consent before giving her Terbutaline violated the applicable standard of care.

The testimony of Drs. Carlton and Lewis was supported by testimony from Mrs. Huss' cardiologist, Dr. Gary Murray of Memphis, Tennessee. Dr. Murray testified that in his opinion Terbutaline caused or contributed to Mrs. Huss' cardiomyopathy and that Terbutaline is reported in some medical literature as a cause of cardiomyopathy.

The testimony of plaintiff's experts was disputed by Drs. Gayden and Giddens and defendants' expert, Dr. James Martin Tucker of Jackson, Mississippi. Dr. Tucker, Board certified in OB-GYN and Maternal-Fetal Medicine, testified that, based upon

his review of Mrs. Huss' medical and pharmacy records, it was, in his opinion, appropriate to administer Terbutaline to Mrs. Huss; that Terbutaline is widely used in the OB-GYN community; that most drugs used to treat women during a pregnancy are used off-label; that it was important to prevent Mrs. Huss from going into preterm labor by using Terbutaline, and that her post-partum cardiomyopathy was idiopathic - of unknown cause. Dr. Tucker acknowledged that in November, 1997, the FDA issued a letter to OB-GYNs nationwide warning of the side effects of Terbutaline's use on pregnant women - various heart related ailments, though not cardiomyopathy specifically - and that the American College of Gynecologists (ACOG) had issued guidelines admonishing against the prophylactic use of Terbutaline to prevent pre-term labor.

In addition to the experts' testimony and their reliance upon (or disputes with) medical publications of the PDR, the FDA or ACOG, plaintiff, her husband and a family friend testified that shortly after she was given the Terbutaline injections she began suffering from shortness of breath - a symptom of cardiomyopathy. However, evidence was offered by defendants showing that nowhere in any of plaintiff's medical records is shortness of breath noted.

A review of all of the evidence, considered in the light most favorable to the plaintiff, with all reasonable factual inferences drawn in her favor, leads the court to the conclusion that far more than a scintilla of evidence was offered to support plaintiff's claim that giving her Terbutaline when she was not in pre-term labor violated the standard

of care and that Terbutaline caused or contributed to her cardiomyopathy. *See: MacArthur v. University of Texas Health Center at Tyler*, 45 F.3d 880 (5th Cir. 1995). Credibility determinations and the weighing of evidence must be left to the jury, *Hughes* and *Johnson, supra*, and the court may not substitute its judgment for that of the jury. Accordingly, defendants' Motion for Judgment as a Matter of Law is DENIED.

Statute of Limitations

Defendants contend that their Motion for Judgment as a Matter of Law based on the statute of limitations should have been granted. The motion was made after plaintiff rested her case. Contrary to the assertion in defendants' memorandum, the motion was not denied because it was listed in the wrong place on the Pretrial Order. The motion was denied for two reasons: first, the Amended Case Management Plan and Scheduling Order entered on November 21, 2002, set a deadline for motions other than *in limine* motions of February 14, 2003. Although continuances of the trial setting were thereafter granted and the discovery deadline was extended, the motions deadline was not extended. Accordingly, the motion was not timely. Second, and more importantly, defendants failed to establish the approximate date on which the statute of limitations began to run. The fact that plaintiff filed suit against Dr. Giddens on June 30, 1999, is not dispositive of this issue. In order to pinpoint the date on which the statute began to run, it was incumbent upon defendants to offer proof of the date by which plaintiff knew or should have known two essential pieces of information: (1) that Terbutaline probably was the cause of her cardiomyopathy, and (2) that

her physician was in error in giving her the drug. As this information was not established at trial, the defendants' motion was properly denied.

Motion for New Trial

Defendants contend that the issue of informed consent should not have been submitted to the jury, relying entirely on *Cary v. Arrowsmith*, 777 S.W.2d 8 (Tenn. Ct. App. 1989), a Tennessee Court of Appeals decision. However, in *Pittman* v. *Upjohn Company*, 890 S.W.2d 425 (Tenn. 1994), a Tennessee Supreme Court decision, in a discussion of whether a physician owes a duty to a non-patient member of the patient's family to warn of the risks of a particular medicine, the court noted: "Dr. Simonton acknowledges that had his patient, pittman's grandmother, experienced a complication as the result of dangers of which she was not advised, the physician's liability would be clear beyond dispute." *Id.*, 890 S.W.2d at 430. The duty of a physician in Tennessee to warn of the adverse effects of a drug was also acknowledged in *Burroughs* v. *McGee*, 188 S.W.3d 323 (Tenn. 2003). No error was committed when the issue of informed consent was submitted to the jury.

Defendants argue that perhaps the gravest error committed at trial was the exclusion of expert testimony by Dr. Michael Reddix, the defendants' causation expert. Dr. Reddix was accepted by the court as an expert in Internal Medicine. Both parties acknowledge that the trial judge possesses broad discretion in passing on the qualification of experts, and his decision will not be disturbed on appeal unless it is manifestly erroneous. *United States* v. *Viglia*, 549 F.2d 335 (5th Cir. 1977). Dr. Reddix's

resume, attached by defendants as an exhibit with their motion, reveals the deficiencies in Dr. Reddix's background and experience insofar as a causation expert in this case is concerned. Dr. Reddix has virtually no experience in obstetrics and gynecology and no experience whatsoever with Terbutaline. Since 1991, Dr. Reddix's employment has primarily been as a staff physician for the Job Corp, the Student Health Center of Jackson State University, and the Hinds County Detention Center. There is simply nothing in Dr. Reddix's background which entitled him to express opinions as to whether Terbutaline caused the plaintiff's cardiomyopathy or whether the cardiomyopathy was idiopathic.

Defendants also argue that Dr. Tucker and Dr. Giddens were improperly restricted from offering opinion testimony on the alleged failure to obtain plaintiff's informed consent. This issue was addressed prior to trial on plaintiff's motion *in limine* to exclude such testimony. Prior to trial Drs. Tucker and Giddens served plaintiff the expert reports required by F.R.C.P. Rule 26. Neither report contained any opinions on the subject of informed consent. On the eve of trial, defendants submitted supplemental reports which touched on the subject of informed consent but did not contain "a complete statement of all opinions to be expressed and the basis and reasons therefor" as required by Rule 26(a)(2)(B). For that reason, plaintiff's motion *in limine* was granted, and Drs. Tucker and Giddens were limited to giving expert opinion testimony as set out in their original reports only.

Defendants further complain that Dr. Giddens was not allowed by the court to give factual testimony on what she habitually tells patients when

prescribing Terbutaline for pre-term labor and pre-term contractions. Such testimony would not have been proper, as Dr. Giddens did not order the Terbutaline injections and did not prescribe Terbutaline for the plaintiff, nor was any foundation laid to establish that Dr. Giddens ever discussed Terbutaline and its potential risks with the plaintiff. Dr. Gayden testified that he did not inform Mrs. Huss of any side effects of Terbutaline and was not required by the standard of care to do so. Accordingly, the proffered testimony of Dr. Giddens was simply irrelevant.

Defendants assert error in the court's refusal to give defendants' proposed Jury Instruction D-14. The court granted an amended version of the proposed instruction, striking the first two proposed sentences which read as follows:

> There is evidence before you to show that the treatment of pre-term labor is a [sic] "off-label" use of the drug Terbutaline. The court instructs you that under the law of Tennessee, where Terbutaline was prescribed to Mrs. Huss, off-label use of a FDA approved drug is legal when prescribed in a medically appropriate way.

The sentences which were stricken from the instruction by the court were misleading and confusing to the jury. In the first place, the first sentence implied that Mrs. Huss was in pre-term labor when Terbutaline was administered to her. The evidence clearly showed Mrs. Huss was not in preterm labor. Second, the instruction as drafted gave no guidance to the jury regarding the meaning of the phrase "medically appropriate way." The

instruction as amended correctly instructed the jury that off-label use of Terbutaline, standing alone, was not negligent and that if the use of Terbutaline by defendants met the standard of care by obstetricians under the same or similar circumstances when treating contractions, then defendants were not negligent. Instruction D-14, as given, was not erroneous.

Defendants contend that the jury panel was drawn from the wrong venue, as the case was tried in part by jurors from the Greenville Division - where the case was tried - instead of a jury composed solely of residents of the Delta Division. Defendants assert that the makeup of the jury conflicts with the provisions of 28 U.S.C. § 1861, as well as basic constitutional due process principles. The assertion is unsupported by any authority and borders on the frivolous. Prior to trial defendants moved the court to select jurors from a Delta Division panel~ knowing full well that pursuant to the 1997 Amendment to the Court's Plan for Selection of Jurors, the Northern District of Mississippi is divided for jury selection purposes into three jury divisions, none of which is identified as a "Delta Division." There is no constitutional right to trial in a particular division of a judicial district, *Franklin v. United States,* 384 F.2d 377 (5th Cir. 1967), *cert. denied* 390 U.S. 954 (1968), and, absent special circumstances, jurors are selected from the division in which the case is tried, as the Plan requires.

Defendants' next assignment of error is that the court failed to remove for cause three jurors who, according to defendants, were improperly influenced by their personal interests in pending or recently resolved personal injury litigation. The responses of

the three jurors to *voir dire* questions regarding their ability and willingness to be fair and impartial jurors gave the court no hint of bias or prejudice on the part of these jurors. The three jurors, Thomas Vance, Preston Bowling and Virginia Roberson, were tendered with a full panel of eight jurors to defendants after the court dismissed two jurors for cause and after plaintiff had exercised two peremptory challenges. Defendants exercised two of their three peremptory challenges against members of the panel other than the three now complained of.

It does not appear the Fifth Circuit Court of Appeals has addressed the question whether a litigant who has challenged a juror for cause, but fails to challenge that juror peremptorily when he has unused challenges, has waived the right to appeal on that issue. The law in Mississippi, however, is clear. When a party challenges a juror for cause and thereafter fails to challenge the juror peremptorily when he has unused challenges, he may not claim error on appeal because of the court's refusal to grant the challenge for cause. *Davis v. Wal-Mart,* 724 So.2d 907 (Miss. 1998); *Capler v. City of Greenville,* 207 So.2d 339 (Miss. 1968), *cert. denied* 392 U.S. 941. Defendants have made no showing of bias or prejudice on the part of the jurors now challenged and may not now claim error in light of their failure to peremptorily challenge the jurors.

The standard of review in Mississippi for jury verdicts is that the court may not set aside the verdict "short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found." *Bell v. City of St. Louis,* 467 So.2d 657, 660 (Miss. 1985). All

credible evidence tending to support the non-movant's case and all favorable inferences reasonably drawn therefrom must be accepted as true and redound to the benefit of the non-movant. If the facts and inferences so considered point so overwhelmingly in favor of the movant so that reasonable persons could not have arrived at a contrary verdict, the motion should be granted. On the other hand, if there is substantial evidence opposed to the motion of such quality and weight that reasonable and fairminded persons in the exercise of impartial judgment might reach different conclusions, the jury verdict should be allowed to stand and the motion denied. *Junior Food Stores, Inc. v. Rice,* 671 So.2d 67, 75 (Miss. 1996).

Before reaching a decision on this issue, the court must first address other assigned errors.

Other Assigned Errors

Defendants complain that plaintiff's counsel questioned Drs. Tucker, Gayden and Giddens about the substance of articles that were never recognized as authoritative. If defendants refer to publications of the Food and Drug Administration (FDA), the Physicians Desk Reference (PDR), or American College of Obstetricians and Gynecologists (ACOG), the court does regard the publications of these organizations as authoritative. Defendants suffered no undue prejudice from the use of publications from the FDA, PDR, or ACOG during cross-examination of defendants' witnesses.

Defendants' next complaint is that the court erred in sustaining the plaintiff's objection during redirect examination of Dr. Giddens when she was asked to read from the medical article she referred to

during cross-examination. The defendants suffered no unfair prejudice as a result of the plaintiff's objection being sustained.

Defendants' final complaint is that a comment made to defendants' counsel by the court during the re-direct examination of Dr. Tucker, to "Hurry, Counsel, his meter's running," furthered the prejudice suffered by defendants. As virtually all in attendance at the trial reacted with some laughter to the comment, the court is of the opinion that everyone understood the comment was made in jest, without a hint of malice, and that defendants suffered no prejudice.

Damages

Defendants submit that the amount of damages awarded the plaintiff was excessive and not supported by the weight of the evidence. Defendants contend that plaintiff's failure to call an economist or other expert, instead of relying as she did on statistical tables, did not entitle her to compensation for future lost earnings. Defendants rely on *Boyd* v. *Smith*, 390 So.2d 994 (Miss. 1980) in support of this argument. In *Boyd*, with respect to expert testimony on the issue of loss of future earnings, the court simply said such testimony was "admissible for what it may have been worth," 390 So.2d at 1000, and did not hold that testimony from an economist was necessary to a recovery of the loss of future earnings.

Defendants further submit that plaintiff's claim of future lost earnings of $468,000 was not discounted to its present net cash value, and that defendants proposed Instruction D-26, which would have instructed the jury to reduce an award for future lost wages to present net cash value, was not

given. The instruction was not given as there was no evidentiary guidance to the jury to assist it in making such a calculation. Moreover, neither party requested a special verdict, and it is impossible to know whether the jury's award of damages included future lost earnings.

On the issue of damages, the plaintiff testified she is 31 years old and that as a result of her cardiomyopathy and the medical issues related to it: she underwent a tubal ligation because of the risk to her health from a future pregnancy; she requires frequent bed rest and is unable to perform ordinary housework; she is no longer able to work outside the home; she is no longer able to engage in strenuous physical activities as she had before the onset of her condition; she is at risk for sudden cardiac arrest and death; she is a potential heart transplant recipient; she is required to take approximately 20 to 25 pills of prescribed medicine daily, the cost of which is $250.00 per week; that she has attacks of severe chest pain and nausea and has lost consciousness; she makes numerous trips to the emergency room at a cost of several hundred dollars to several thousand dollars per visit; she has regular appointments with her cardiologist every three to six months; and that her relationships with her children and her husband have been greatly impaired, including the sexual relationship with her husband. Plaintiff's claim that she could no longer work was challenged on cross-examination. No evidence was offered by defendants to rebut any of her other claims.

In Mississippi, a court may disturb a jury verdict if the court finds that the damages awarded are excessive for the reason that the jury was influenced

by bias, prejudice, or passion so as to shock the conscience, or if the damages were contrary to the overwhelming weight of credible evidence. *Junior Food Stores, Inc. v. Rice,* 671 So.2d at 76. The question for the court is whether, considering the evidence in the light most favorable to Mrs. Huss, the court can say that no reasonable jury could have concluded on the facts in this case that Mrs. Huss' damages amounted to 3.5 million.

While the jury's verdict is extraordinarily large, the evidence, when viewed in the light most favorable to Mrs. Huss, accepting the credible evidence tending to support her case and the inferences reasonably drawn therefrom, supports a finding that Mrs. Huss has a debilitating heart condition that has rendered her unable to work and restricts her from performing many of the wifely and motherly functions of a healthy woman. Mrs. Huss faces a lifetime of extraordinary medical expenses and the pain and suffering to which the medical expenses are directed. She also faces the threat of a shortened lifespan or heart transplant surgery to lengthen it. In the face of the evidence so viewed, the court cannot say that the verdict is so excessive as to evince bias, prejudice and passion on the part of the jury as to shock the conscience of the court. Accordingly, defendants' Motion in the alternative for a New Trial should be DENIED, and the jury verdict should be allowed to stand.

An order in accordance with this opinion shall issue this same date.

THIS, the 7th day of October, 2004.

/s/ United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI
GREENVILLE DIVISION

BARBARA HUSS and RODNEY HUSS,
Plaintiffs

v.

JOHN OVERTON GAYDEN, M.D. and
MEMPHIS OBSTETRICS AND
GYNECOLOGICAL ASSOCIATION, P.A.,
Defendants

No. 2:00CV131-EMB

Entered: October 7, 2004

FINAL JUDGMENT

In accordance with an Opinion entered this day, it is hereby ordered and adjudged:

1. That defendants' Motion for Judgment as a Matter of Law or in the alternative, Motion for New Trial, be, and is hereby, DENIED, and the jury verdict finding for the plaintiff and awarding her $3,500,000.00 is allowed to stand.

2. All costs of this proceeding are taxed to defendants.

SO ORDERED, this, the 7th day of October, 2004.

/s/ United States Magistrate Judge

Excerpts of Transcript of Trial Proceedings

On August 20, 2004

(pages 545 – 549)

Reddix - Direct 545

* * * * *

Hospital DeSoto, from St. Francis Hospital, from Baptist Hospital East, from Memphis Memorial Hospital-Germantown, from Dr. Gary Murray, prescription printout from Walgreen's Pharmacy, written statement of Barbara Huss, medical article that you attached to your own report, and medical articles submitted by plaintiff's experts. Did you review all those?

A Yes, sir.

Q Doctor, do you have an opinion, based upon reasonable medical probabilities and upon your education, training, and experience as a physician, as well as your review of these materials I just read, as to whether or not Terbutaline caused or contributed to the cardiomyopathy suffered by Barbara Huss?

MR. CHAPMAN: Your Honor, I'm going to voice an objection. In his report, I believe it indicated he doesn't know the cause. And in his deposition he said he didn't know the cause. So I object to him testifying about the cause.

MR. CARAWAY: Your Honor, I will read in response the very first para – sentence from this -- Dr. Reddix's opinion. It is my opinion that Barbara Huss' cardiomyopathy cannot be said to have been caused to a reasonable degree of medical certainty or probability by the administration of oral

Terbutaline. I asked him what's in the first sentence of his opinion.

MR. CHAPMAN: No. That -- Your Honor, let me -- as a matter of semantics, inasmuch as he is going to testify, he can't say that it cannot be said what caused it. Not that he has an opinion that it didn't cause it.

THE COURT: Let me see you lawyers in chambers for a minute.

(In Chambers)

THE COURT: Now, on what basis is this witness qualified to offer any opinion about whether administering Terbutaline did or did not cause the cardiomyopathy here?

MR. CARAWAY: He's an internal medicine physician who treats patients with cardiomyopathies. He has a degree from Harvard in Public Health, including studying statistics. He's reviewed the medical literature. I mean, he has patients all the time who have cardiomyopathy. He knows the drug interactions.

THE COURT: I don't know about that last statement. I'm inclined to think this is outside the area of his expertise.

MR. CARAWAY: I have to say, Your Honor, that I am shocked by the Court's opinion on that. Certainly if they wanted to file a motion to strike him prior to trial, plaintiffs could have done so. But Dr. Reddix, I mean he treats patients all the time. You know, internal medicine doctors prescribe prescription medications more often than any other specialty. And he's very well -- you know, like I said, I guess I'm shocked.

THE COURT: I understand that. But I don't--what experience or training does he have that enables him to say that the administration of this drug did or did not probably cause cardiomyopathy?

MR. CARAWAY: Internal medicine training. Medical school training. Years of treating patients with pulmonary edema, congestive heart failure, and cardiomyopathy. Plaintiffs have brought up pulmonary edema and tried to put it in the same intellectual wastebasket as cardiomyopathy and act like they're the same thing. It's important that he explains to the jury that they are not the same thing.

THE COURT: Well, he did so. It took him forever to get around to it. But I'm not going to let him express an opinion as to whether the administration of this drug caused or did not cause the cardiomyopathy here.

MR. CARAWAY: Well, very well. I would like to state that I am shocked by this, especially in light of the plaintiff's liability expert getting to testify outside of his opinion when he got to talk about hypertension as being the reason Mrs. Huss shouldn't have gotten the Terbutaline. I guess if we can dismiss the jury and I'll make a record with Dr. Reddix and we can dismiss him if that is the Court's final ruling.

THE COURT: If that's what he's being called for, I guess so. Let's go move the jury to the jury room.

MR. CHAPMAN: Your Honor, we want to say for the record that we seriously feel that Dr. Reddix, of all the witnesses, is not qualified to testify on the lines of whether the Terbutaline did or did not cause. Obviously, he would say did not cause. He's not

qualified for it. He's had absolutely no experience with Terbutaline. He's done research on it. He has done --

THE COURT: Since I've already ruled as I have, why are you going on with this?

MR. CHAPMAN: I guess I didn't have good sense.

THE COURT: I guess not.

MR. CHAPMAN: I'm sorry, Judge.

MR. CARAWAY: May I state that I believe Dr. Reddix is certainly as qualified as Dr. Carlton. Dr. Reddix treats patients chronically, on a chronic basis, not an acute basis, who have different heart conditions including cardiomyopathy. Dr. Carlton has been practicing ER medicine. He treats them on an acute basis and sends them on into the hospital. Dr. Carlton has a toxicology degree that is more related to poisons. All physicians receive treatment on medications, prescription drugs. But I realize the reason. It is Friday. And I don't want to – I do not mean to be disrespectful or offensive with the Court. I just wanted to state my objections on the record. And then we can – if I can make my record with Dr. Reddix, we can move on to Dr. Tucker, and we will rest. And by stating my objection to the Court's rulings, I certainly mean no impertinence or disrespect.

THE COURT: I understand. I know you don't agree. Okay. Is the jury back in the jury room?

THE MARSHAL: Yes, sir, they are.

THE COURT: I'll let you go ahead and make your record.

MR. CARAWAY: Your Honor, do you prefer that I just ask him questions, the main questions of my direct and then let that be it?

THE COURT: Yes, sir.

MR. CARAWAY: I'll try to get it over with as soon as possible.

(End of Chambers)

(Jury Not Present)

THE COURT: Go ahead, counselor.

BY MR. CARAWAY:

Q: We need you to state in narrative, you know, not too long, state your basis as to why Terbutaline in your opinion was not the cause of or contributing cause of cardiomyopathy.

A: Basically, there's no esbalished evidence that has

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Entered: October 15, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-60962

BARBARA HUSS; RODNEY HUSS
Plaintiffs - Appellees

v.

JOHN OVERTON GAYDEN, M.D.; MEMPHIS OBSTETRICS AND GYNECOLOGICAL ASSOCIATION PC
Defendants - Appellants

Appeal from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 6/10/09, 5 Cir., 571 F.3d 442)

Before HIGGINBOTHAM, DeMOSS, and OWEN, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing is DENIED. Judge Higginbotham dissents from the panel's denial of rehearing.

The court was polled at the request of one of the members of the court. A majority of the judges who are in regular active service and not disqualified not having voted in favor of rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the Petition for Rehearing En Banc is likewise DENIED. Judge Higginbotham and Judge Elrod have authored dissenting opinions, which are attached. Upon the filing of this order, the clerk shall issue the mandate forthwith. *See* FED. R. APP. P. 41(b).

PRISCILLA RICHMAN OWEN, Circuit Judge, concurring:

I write as a member of the panel to address the dissenting opinions. Each of the opinions proceeds on the incorrect premise that the panel majority has held that the magistrate judge erred in excluding expert testimony regarding *specific*, as distinguished from *general*, causation. The dissenting opinions do not take issue with the panel majority's conclusion that Dr. Reddix was qualified to offer testimony regarding general causation. The points on which the dissents and the panel majority differ boil down to this: (1) did the panel majority hold that the magistrate judge erred in excluding the testimony of Dr. Reddix as to general, rather than specific, causation, and (2) does the record support the dissents' assertion that Dr. Reddix's testimony was excluded because it was addressed to specific, rather than general, causation. An examination of the panel majority's opinion and the record resolves these questions. They reflect that "the crux" of Dr. Reddix's testimony pertained to general causation,[1] and his testimony was excluded because the magistrate judge concluded he was not qualified to testify regarding even general causation.[2]

I.

I respectfully submit that the panel majority's opinion is clear that the exclusion of Dr. Reddix's testimony was error because it addressed *general* causation and that Dr. Reddix was qualified to offer

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[1] *Huss v. Gayden*, 571 F.3d 442, 456 (5th Cir. 2009).

[2] *Id.* at 449.

general causation testimony. The following quotations are from the panel majority's opinion:

- Defendants sought to elicit testimony from their expert, Dr. Reddix, that medical literature relied upon by Dr. Carlton [the plaintiffs' expert] in forming his opinion does not show a causative relationship between Terbutaline and cardiomyopathy. The magistrate judge did not permit Dr. Reddix to state this opinion, as this was "outside the area of his expertise."[3]

- Dr. Reddix said: "Basically, there's no established evidence that has been tested and published in major journals or the [Physician's Desk Reference] that it causes cardiomyopathy." Counsel then asked "what in the medical records caused you to believe that Terbutaline is not the causative agent?" Dr. Reddix said one could not deduce a causative relationship because the articles relied on by the Husses' experts had very small sample sizes, and additionally, some articles may have confused pulmonary edema with cardiomyopathy. By contrast, Dr. Reddix was prepared to testify based upon a study of 9,000 patients who took Terbutaline and did not develop cardiomypathy. The thrust of the proffered testimony was that Terbutaline could not be said to be the cause of Barbara's cardiomyopathy, and that the cause of her condition could not be

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[3] *Id.* at 449.

determined, *i.e.*, the condition is idiopathic.[4]

- Dr. Reddix testified in part:

> [M]any of the articles that they talk about were very, very small studies. And the possibility of chance occurrences were very high. When you had four people out [of] 16, where it only occurs in one in 5,000 to 10,000 patients. So a lot of times the journals that were listed [by the Husses' experts] also confused what was said about pulmonary edema as a part of the problem, which would lead to a cardiomyopathy in any of those studies.[5]

- Defendants posit that this qualified Dr. Reddix to opine that the medical literature and Barbara's records do not allow one to infer that Terbutaline causes cardiomyopathy, or that it caused Barbara's case. . . . Defendants argue that the ruling was prejudicial because it prevented them from challenging the Husses' causation testimony and Dr. Carlton's characterization of the medical literature.[6]

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[4] *Id.* at 453-54.

[5] *Id.* at 454 n.9.

[6] *Id.* at 454.

- Through Dr. Reddix's testimony, the defendants sought primarily to discredit the contention that Terbutaline is a known cause of cardiomyopathy, and consequently, that Terbutaline more likely than not caused Barbara's cardiomyopathy. Dr. Reddix did not need to be board-certified in cardiology or toxicology to explain that the studies relied on by the Husses do not prove a causative relationship–especially given the very small number of patients in those studies. Dr. Reddix's training and experience as a medical professional qualify him to tell the jury why the literature does not establish a causal link. Moreover, Dr. Reddix identified a study of over 9,000 people which tended to undermine the Husses' claims. In short, Dr. Reddix's education and knowledge allowed him to form a reliable opinion as to whether, as a general matter, Terbutaline causes cardiomyopathy.[7]

- We think that the more general nature of Dr. Reddix's conclusions helps to distinguish the present case from *Tanner*.[8] There, all experts agreed as a general matter that birth asphyxia can cause cerebral palsy. 174 F.3d at 548. The issue was more specific: whether the defendants' failure to properly treat a newborn baby's birth asphyxia caused the baby's cerebral palsy, or whether the cerebral palsy was caused by another event. *See id.* at 547-48. We held that it was erroneous to

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[7] *Id.* at 455.

[8] *Id.* (citing *Tanner v. Westbrook*, 174 F.3d 542 (5th Cir. 1999)).

admit an expert's opinion that the defendants' actions led to the baby's cerebral palsy when the medical literature did not support this theory of causation, the expert had not examined the baby, and the expert also had no personal experience that would validate his theory. *Id.* at 548.

In this case, the parties fought mainly over whether Terbutaline can cause cardiomyopathy. The Husses' expert, Dr. Carlton (who is a toxicologist, not a cardiologist), relied on this general premise when opining that Terbutaline caused Barbara's cardiomyopathy. . . . The main purpose of Dr. Reddix's opinion was to rebut an untenable conclusion. Dr. Reddix's knowledge qualified him to tell the jury that Dr. Carlton's inferential leap was unsupported by medical literature, and that in his judgment, Barbara's peripartum cardiomyopathy was idiopathic. We do not think that Dr. Reddix needed to be specialized in cardiology or toxicology to act as a counterpoint to the Husses' experts.[9]

- The crux of this case was whether Terbutaline causes cardiomyopathy. The magistrate judge's ruling prevented the defendants from demonstrating that the Husses relied on medical literature which was unreliable, anecdotal, and contradicted by other studies. The Husses insist the defendants were not prejudiced because the defendants' other

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[9] *Id.*

> witnesses disclaimed a causal link between the drug and Barbara's condition. However, none of the other witnesses gave the level of detail that Dr. Reddix would have presented, nor did the witnesses testify about studies showing no link between Terbutaline and cardiomyopathy. The exclusion was not harmless error. In a close case such as this, Dr. Reddix's testimony would "have added information that, if the jurors found it credible, might have been determinative" of the difficult causation questions. *See Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 553 (5th Cir.2000).[10]

The panel majority's opinion should not, and I believe cannot, be read as holding that the magistrate judge erred because testimony regarding *specific* causation was excluded. While there are perhaps statements that might be lifted out of context to support an argument that the panel majority was addressing Dr. Reddix's qualifications to testify regarding specific causation, that is not the import of the opinion. The opinion, read in its entirety regarding the exclusion of expert testimony, makes clear that Reddix would have testified that the plaintiffs' experts' opinions regarding general causation were not scientifically reliable and that Terbutaline has not been shown to cause cardiomyopathy. The logical inference from this testimony was that Barbara Huss's cardiomyopathy could not be caused by Terbutaline if there is no reliable evidence that Terbutaline causes cardiomyopathy. But the obvious inference regarding

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[10] *Id.* at 456.

specific causation that is drawn from general causation testimony does not render Dr. Reddix's general causation testimony either "specific" causation testimony or inadmissible because he might not be qualified to give "specific" causation testimony.

II

With regard to the record, much of the testimony and the magistrate's ruling are contained in the panel majority's opinion, and I will not repeat that here. I add only that Dr. Reddix was the only defense expert designated to discuss the medical literature on which the plaintiffs' expert based an opinion regarding general causation. It was apparent at trial that Dr. Reddix would testify about general causation. Counsel for the Husses conducted a voir dire examination of Dr. Reddix early in his testimony to attempt to lay a foundation for excluding him as a witness on the basis that he was not qualified to opine regarding causation. Counsel for the Husses asked Dr. Reddix, "Now, in this case, you are being offered as an expert in the field of internal medicine and *principally as it relates to whether Terbutaline caused or can cause cardiomyopathy*. Is that your understanding?" Reddix replied, "Yes." This unmistakably reflects that general causation was at issue.

Judge Higginbotham's dissenting opinion asserts that "Reddix opined at length on general causation, before any objection. . .," implying both that Reddix had completed his testimony regarding general causation and that any error in excluding additional testimony regarding general causation would have been harmless. The record does not bear out this

assertion. As the panel majority opinion makes clear, Dr. Reddix was prepared to testify that articles on which the plaintiffs' expert relied were not scientifically reliable.[11] This relates to general, not specific, causation, as discussed above. The magistrate judge excluded this testimony, concluding that Reddix was not qualified to testify about causation. No other witness offered testimony regarding the medical literature on which the plaintiffs' expert relied.

Judge Higginbotham's dissent lifts the questions asked of Dr. Reddix during the proffer out of context in an effort to demonstrate that only specific causation testimony was at issue and was excluded. But when the record is considered as a whole, including the proffered testimony that is quoted in the panel majority's opinion,[12] there can be little doubt that the parties and the magistrate judge understood that Dr. Reddix was prepared to testify regarding the scientific reliability of the articles on which the plaintiffs' expert relied. That was directly related to general, not specific, causation, and that testimony was excluded.

III

Judge Higginbotham's dissent once again excoriates the panel for referring the statute of limitations issue to the Mississippi Supreme Court. He now castigates other members of the court for denying rehearing on the limitations issue. I find it exceedingly difficult to understand why a federal court should be criticized for asking a state court, in

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[11] *Id.* at 449, 453-54, 455.

[12] *Id.* 453-54.

a diversity case, to resolve what appeared to many to be an unsettled question of state law. In my view, it was precisely because the state law appeared to conflict that this case was not taken en banc and instead, the limitations issue was certified by the panel.

* * * * *

I concur in the denial of rehearing en banc.

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom KING, DAVIS, WIENER, BENAVIDES, STEWART, and DENNIS, Circuit Judges, join, dissenting:

I

Over nine years ago, Barbara Huss and her husband Rodney Huss filed this medical malpractice lawsuit, alleging that defendants negligently administered the drug Terbutaline to Barbara during her pregnancy—negligence that caused Barbara's cardiomyopathy, a condition that severely crippled her for life and shortened her life span. The Husses won a jury trial in August 2004, and the defendants appealed to our court. A panel majority here reversed and rendered the judgment holding that the case was barred by limitation.[1] The Husses

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[1] *Huss v. Gayden* (*Huss I*), 465 F.3d 201, 208–09 (5th Cir. 2006); *id.* at 209 (Higginbotham, J., dissenting). The panel majority's holding that the case was barred by limitations was itself inexplicable. The defense here was that cardiomyopathy was idiopathic—that science, let alone the defendant doctors, did not know its cause. They pled limitation but offered no evidence at trial in its support. This left the "defense" available only as a matter of law as any fact questions the defense presented were found as a matter of law in favor of the plaintiffs' judgment. This made practical sense as able defense counsel could not stand before the jury and argue that his client doctor could not have known that Terbutaline was the cause—because science did not know—but Ms. Huss, a young Mississippi housewife, should have known when told that she suffered cardiomyopathy that it was caused by Terbutaline. Although Mississippi has a "discovery statute," the panel majority held that limitations ran from the time Huss learned she had cardiomyopathy–that she should have known then that Terbutaline was the cause–as a matter of law. The Mississippi Supreme Court politely responded that the case was not barred.

requested rehearing en banc. In 2006, it was denied by an equally divided vote of seven judges "for" and seven "against." The panel majority granted panel rehearing sua sponte, withdrawing its opinion.[2] Eleven months later, it certified, over dissent, the question to the Mississippi Supreme Court.[3] The Mississippi court found that the defendants' limitations defense was meritless.[4]

The panel moved to a judgment reversing and remanding for trial error. The found error was in the trial judge's refusal to allow one of the defense experts, Dr. Reddix, to express the opinion that Terbutaline was not a cause of Barbara Huss's cardiomyopathy, although the witness was allowed without objection to testify fully about general causation and that cardiomyopathy was idiopathic; its cause was unknown to medicine and unknowable to the defendant doctors. The error it fastened on was a refusal to allow Reddix to continue on from his testimony about general causation and relate it to Huss; that it was a manifest disregard of the law to do so. The opinion's author, writing alone, also subjected plaintiffs' experts to a personal view of *Daubert*.[5] This gratuitous instruction is explained by

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[2] *Huss v. Gayden* (*Huss II*), 2006 WL 5013195, at *1 (5th Cir. Dec. 27, 2006) (per curiam).

[3] *Huss v. Gayden* (*Huss III*), 508 F.3d 240, 245–48 (5th Cir. 2007); *id.* at 248 (Higginbotham, J., dissenting).

[4] *Huss v. Gayden* (*Huss IV*), 991 So. 2d 162, 165 (Miss. 2008).

[5] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). This view should not be confused with the panel majority's contrasting view of *Daubert* deployed to *sustain* the admissibility of Reddix's expression of opinions on specific causation—that the established distinct thresholds for general

its history. It came after an earlier failed effort of the panel to reverse the case for insufficient evidence—this by disregarding plaintiffs' evidence as failing the demands of *Daubert*, despite the fact that there was no objection to the admission of the testimony of plaintiffs' experts, on any basis, making the evidence competent as a matter of law. That treatment of *Daubert* was recast as an instruction to the district court on remand.

The Husses again petitioned for rehearing en banc, a request our court now rejects by an equally divided vote. Eight judges concluded that the case was not "en banc worthy," ignoring the views of eight judges who think the decision was plainly wrong and contrary to settled precedent.

The sole question remains whether the trial court committed manifest error in sustaining the objection to part of the testimony of Reddix. I will not repeat my panel dissent, instead, I write to publish the panel's refusal to apply circuit precedent, to respect our highly deferential standard of review, and to set the *Daubert* bar at the same level for plaintiffs and defendants. Our full court's refusal to even hear the case only solidifies the error of the panel and exposes another—the subscription of eight members of this court to a stunningly aggressive view of the judicial role coupled with a misguided view of the role of the en banc court—a subscription with which I cannot join and to these eyes is profoundly mistaken. It is

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and specific causation do not apply to Reddix because he was testifying in rebuttal to plaintiffs' experts who testified regarding specific causation. This discrimination favoring defendant doctors is legally indefensible, whatever its force as a matter of "policy."

telling that each judge voting against reconsideration of the court's present decision also voted against en banc reconsideration of the reversal of the judgment as time barred. The only change in the voting pattern came with three new judges, two of whom voted against en banc and one voting for.

II

Our review of the trial court's exclusion of Reddix's testimony was forabuse of discretion, here the most deferential of that genre; whether the trial court manifestly disregarded the law. The panel majority turned this standard upside down. It inserted "what could have happened" for what did. "Manifest error is one that is plain and indisputable, and that amounts to a complete disregard of the controlling law."[6] We do not have the discretion to decide afresh preliminary facts of admissibility, that discretion belongs to the trial court. The ultimate question of whether an expert is qualified to testify is a question of law, but that inquiry is made in light of the lower court's preliminary factual findings on the matter,[7] including the scope of excluded

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[6] *Guy v. Crown Equip. Corp*, 394 F.3d 320, 325 (5th Cir. 2004) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 141–42 (1997)); *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 988 (5th Cir. 1997); *Smogor v. Enke*, 874 F.2d 295, 297 (5th Cir. 1989); *see also James v. Harris County*, No. 07-20725, 577 F.3d 612, 619 (5th Cir. 2009) ("District courts enjoy wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous." (quoting *Watkins*, 121 F.3d at 988) (internal quotation marks omitted)).

[7] 21A CHARLES ALAN WRIGHT&ARTHUR R.MILLER, FEDERAL PRACTICE&PROCEDURE § 5053.1 (2009) ("The qualifications of a

evidence. The record here is pellucid. There is no uncertainty of what happened at trial—not with the objection, the ruling, or defendant's proffer. The panel majority struggled to find uncertainty in the record, an effort to find what does not exist. This whole effort disregards the controlling principle—that even if it succeeded in raising a question of fact underlying the trial court ruling on admissibility or the scope of the ruling—and it did not—the question would have to be resolved in support of the trial court ruling. To take away the jury verdict on the ruling of the trial judge drains all discretion from the hands of the judges who are best equipped to decide and substitutes a de novo standard for plaintiffs' cases. That this is being done while waiving the *Daubert* flag is all the more confounding.

III

The question before the panel required application of the concepts of general and specific causation, and the line between the two. As the panel dissent explained, our decision in *Tanner v. Westbrook* binds this court on the issue and requires us to acknowledge the fundamental principle of the generalspecific dichotomy: that a witness may be competent to testify about general causation but not specific causation.[8] In *Tanner*, we reversed a Mississippi jury award of damages to parents against doctors in a cerebral palsy case, concluding that the district court committed reversible error in

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person to render an expert opinion is a Rule 104(a) preliminary fact to be decided by the judge. The cases and the writers all agree on this." (citations omitted)).

[8] 174 F.3d 542 (5th Cir. 1999).

allowing a plaintiff's expert with general medical training to express an opinion on specific causation because he was only qualified to express an opinion on general causation.[9]

In this case, Reddix opined at length on general causation, before any objection, stating for example that:

> An important thing about that to me is that in pregnancy *we don't even know what causes it [cardiomyopathy].* They just put down it's pregnancy, peripartal. *They don't know what causes it. Because there are 30 causes of it– there are 30 causes of it if you're not pregnant, and then there's about four or five even if you are pregnant*, so–"

When defense counsel moved to matters of specific causation, however, plaintiffs objected. The question to which the magistrate judge sustained the objection indisputably sought an opinion on specific causation:

> Doctor, do you have an opinion, based upon reasonable medical probabilities and upon your education, training, and experience as a physician, as well as your review of these materials I just read, as to *whether or not Terbutaline caused or contributed to the cardiomyopathy suffered by Barbara Huss*?

After the objection, and out of the presence of the jury, the magistrate judge made it clear he was excluding only specific causation testimony. He asked defense counsel "on what basis is this witness

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[9] *Id.* at 547.

qualified to offer any opinion about whether administering Terbutaline did or did not cause the cardiomyopathy here?," before concluding "I'm not going to let him express an opinion as to whether the administration of this drug caused or did not cause the cardiomyopathy here."

Defense counsel then posited each and every proffer question in specific causation terms:

1. "We need you to state in narrative, you know, not too long, state your basis as to why Terbutaline in your opinion was not the cause of or contributing cause of cardiomyopathy."
2. "Did your review of the medical records have anything to do with your opinion as well?"
3. "Could you indicate, state what in the medical records caused you to believe that Terbutaline is not the causative agent?"

These are inquiries into specific causation. Reddix testified before the jury at length and without objection that science does not know what causes cardiomyopathy, or whether Terbutaline causes it. He was not allowed to also testify that Terbutaline was not the cause in this case. Defense asked the four questions (one in front of the jury, and the three in proffer) in an attempt to elicit testimony on specific causation, and it was that testimony the district court excluded. After this exclusion, defense counsel made no attempt to relate his questions to general causation. No ruling of the trial judge barred the defense lawyer from eliciting general causation testimony—such as a critique of the plaintiffs' scientific studies—or from supplementing earlier opinions already in evidence.

The magistrate applied the principles this court established in *Tanner*—that opinions on specific causation involve the specialized skill of recognizing cause and effect in a particular and unique case, as opposed to rote explanation of the relevant literature, and therefore pose a higher bar for reliability—and ruled that Reddix lacked the experience and training to opine on "whether or not Terbutaline caused or contributed to the cardiomyopathy suffered by Barbara Huss," a distinct issue of specific causation and the exact question to which the objection was sustained.

Like the witness in *Tanner*, Reddix was not competent to connect general principles to the specific patient. For one, Reddix could not evince the requisite experience as a treating obstetrician and gynecologist who had experience in administering Terbutaline to pregnant patients. Under *Tanner*, then, it would have been reversible error to admit Reddix's opinion that Terbutaline was not a cause or the cause of Barbara Huss's injuries.

Even the defendants do not seriously defend the panel's refusal to apply *Tanner*. Rather they "concede" the undisputed fact that this entire case was about general causation, the relationship between Terbutaline and cardiomyopathy, not specific causation, the cause of Huss's injury—this to escape reliance on the indefensible contention that Reddix was competent to express an opinion on specific causation. This retreat only makes plain that refusing to allow the witness to go further and offer an opinion on specific causation could not be reversible error when the battle was pitched on general causation, and Reddix was allowed to testify on general causation without objection. The panel

asserts that Reddix was competent to express his opinion that there was no scientific basis for linking Terbutaline to cardiomyopathy and was thus competent to rebut the testimony of Dr. Tucker who testified as to specific causation for the plaintiffs. Of course that is exactly what Reddix did—without objection. The ruling was a refusal to allow Reddix to go further. Here, the opinion defies the settled law of this circuit, holding that a person competent to express an opinion on general causation is a fortiori competent to express an opinion on specific causation.

IV

This case should have been taken en banc to correct a large error in federal law. A diversity case it is but our issue of junk science is a federal issue, with far-ranging import. There is *Tanner* and our en banc case of *Moore v. Ashland Chemical Inc.*,[10] and before that, *Eymard v. Pan American World Airways*,[11] a pre-*Daubert* rejection of expert testimony, each urging trial judges to act as gatekeepers. The central thrust of these cases and *Daubert* has been to charge the trial judge to take hold: to turn back opinion testimony of party-engaged experts that rests on questionable competence, and to not kiss off issues of competence as going to the weight of the evidence, leaving a jury to offer answers that good science rejected. Our court's unwillingness to correct the panel error drops the gate, and belies the role of the en banc court; it

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[10] 151 F.3d 269 (5th Cir. 1998) (en banc).

[11] *Eymard v. Pan Am. World Airways*, (*In re Air Crash Disaster*), 795 F.2d 1230 (5th Cir. 1986).

will and should be read as a rank preference of defendants in malpractice cases—a heavy thumb on the scale in the critical area of expert testimony. Make no mistake, the use of experts continues to work major changes in the dynamics of litigation: Consider the law of privilege (see the proposed changes to Rule 26) and challenges to the role of private attorneys-general.

Here, the objection at issue was to specific causation, and no plain, indisputable, and complete disregard for the law can be shown. To the contrary, the record is crystal clear that the only evidence excluded was evidence proffered in support of specific causation. It was a well-tried case by competent lawyers and a competent judge. The panel majority's frustration with this reality, its earlier efforts to reverse with a limitations bar followed by an effort to render on *Daubert* grounds, having failed, cannot be vented by clinging to defendants' throwaway argument addressed to the only objection made to evidence in the trial.

I speak only of the objective message given by the court's handling of this case. Whatever the impulses of individual judges, about which I am silent, that message is clear. To leave this opinion on the books unsettles the law of the circuit and delivers a gross injustice. There is a large policy debate in this country over the wisdom of providing a patient a claim against his doctor for negligence. Whatever the relative merits of the contending forces, there is an abandonment of judicial roles when judges allow their private view on jury trials and the divisive issues of health care to guide their judicial hand. The appearance cast by objective recitation of the history of this case is more than judges seeing a case as an

opportunity to reach preferred social ends, it is an unwitting loss of place that disserves the judicial duty of disinterest, essential to the integrity of any court. Ms. Huss had a legal right to pursue her claim and a legal right to a jury trial. Not only has this court taken that away, it has volunteered suggestions to the district court that he should exclude the testimony of the plaintiffs' experts, this after reversing him for excluding evidence offered by the defendants.

This court has drifted to a seriously flawed view of the role of an en banc court. That half of the active judges would first refuse to consider the panel ruling that the case was barred by limitation and then years later refuse to consider en banc the panel majority's present ruling exposes the court's new vision. This is a court of error. It is not the Supreme Court. It does not have "discretion" to just "decline to rule." Unlike the Supremes, it does not have the discretion to decide what it will decide, a powerful tool for implementing social policy.[12] This is no lonely view. It is shared by distinguished scholars.[13]

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[12] As Justice Brennan described the importance to the Supreme Court function of the power to decide what to decide, "[it] is an indispensable and inseparable part of this entire process, and it cannot be curtailed without grave risk of impairing the very core of the extraordinary function of the Supreme Court." William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 484 (1973).

[13] See generally Paul D. Carrington & Roger C. Cramton, Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court, 94 CORNELL L. REV. 587 (2009); Daniel J. Meador, Reining in the Superlegislature: A Response to Professors Carrington and Cramton, 94 CORNELL L. REV. 657 (2009).

There can be no offhand dismissal such as—no great injustice here, the plaintiffs' science is weak, I think. This leaves litigants at the mercy of panel roulette—the "law" being the unchartered and legally indefensible view of two judges. There is sad irony in this court's handling of the limitations question. The same judges prepared to hold that the Husses lost all their rights to sue when they did not file within two years of her diagnosis now, after nine years in federal court, hold that the case should start over, with a large suggestion that the trial judge should not let this case get to a jury again. Trials of civil cases are disappearing in federal courts. Litigation is fleeing the courts. Much is being written about this phenomenon and why it is occurring. To those students I say: read this case.

JENNIFER WALKER ELROD, Circuit Judge, with whom WIENER, BENAVIDES, and PRADO, Circuit Judges, join, dissenting:

I dissent for only the substantive legal reasons stated in Judge Higginbotham's dissent, and write separately to emphasize my understanding of the most compelling reasons for en banc rehearing.

Huss v. Gayden, 571 F.3d 442 (5th Cir. 2009), is no run-of-the-mill *Daubert*[1] case that might fade away as a precedent limited to its facts. It deserves our en banc consideration not because this kind of reversal is a true rarity in this circuit and every other—which it is—and not because the result did an injustice to these litigants—which it did, *see id.* at 462–67 (Higginbotham, J., dissenting)—but because it creates an irreconcilable conflict in our *Daubert* jurisprudence. What is a trial judge to do when he or she is persuaded that an expert witness is not qualified to render a specific-causation opinion because of the witness's deficient explanation or lack of specific experience? Facing comparable experts, *Moore v. Ashland Chemical Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc), says that the trial judge *may* exclude, *Tanner v. Westbrook*, 174 F.3d 542 (5th Cir. 1999), says that the judge *must* exclude, and now *Huss* says that the judge *must not* exclude.

Somewhat thankfully, the panel opinion cannot have changed our law, for "where two previous holdings or lines of precedent conflict the earlier opinion controls and is the binding precedent in this circuit." *Rios v. City of Del Rio, Tex.*, 444 F.3d 417,

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[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

425 n.8 (5th Cir. 2006).[2] Nonetheless, *Huss* will undoubtedly confound both our litigants and our trial courts, who have neither the occasion nor the duty to resolve such contradictions in our jurisprudence. That task belongs to our court, and today we have failed. Accordingly, I would rehear this case to resolve the apparent conflict between *Huss* and *Tanner* and *Moore*. Because the court does not, I respectfully dissent.

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[2] Moreover, "'no panel is empowered to hold that a prior decision applies only on the limited set of facts set forth in that opinion,' *United States v. Smith*, 354 F.3d 390, 399 (5th Cir. 2003), and a prior panel's explication of the rules of law governing its holdings may not generally be disregarded as dictum. *Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (5th Cir. 2000)." *Rios*, 444 F.3d at 425 n.8.

Court, U.S.
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No. 09-842

In The Supreme Court of the United States

BARBARA HUSS and RODNEY HUSS,

Petitioners,

v.

JOHN OVERTON GAYDEN, M.D., and MEMPHIS OBSTETRICS AND GYNECOLOGICAL ASSOCIATION P.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioners contend that a panel of the Fifth Circuit Court of Appeals misapplied the abuse of discretion standard of review when the panel reversed a lower court ruling excluding expert evidence. Assuming *arguendo* that Petitioners are correct, is there a compelling reason for this Court to review the alleged error when it is not egregious and is not likely to be repeated?

2. Given that each circuit court of appeals states that it applies the abuse of discretion standard when reviewing issues relating to expert evidence, is there a circuit split concerning the scope of appellate review that requires this Court to exercise its supervisory power?

3. Does the Fifth Circuit panel's application of the abuse of discretion standard of review for expert opinion testimony represent a departure from settled precedent?

RULE 29.6 STATEMENT

All parties to the proceeding are included in the caption and on the cover. Respondents are an individual and a privately owned professional corporation ("P.C."). No party is a parent or publicly held company owning 10% or more of a corporation's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	3
I. GIVEN THE UNIQUE, CASE-SPECIFIC CIRCUMSTANCES THAT UNDERLIE THE OPINION AT ISSUE, THE FIFTH CIRCUIT COURT OF APPEALS' ALLEGED MISAPPLICATION OF THE ABUSE OF DISCRETION STANDARD OF REVIEW DOES NOT WARRANT AN EXERCISE OF THIS COURT'S SUPERVISORY POWER	4
II. PETITIONERS' ATTEMPT TO MANUFACTURE A CIRCUIT SPLIT REGARDING THE STANDARD OF REVIEW IS UNSUCCESSFUL	10

TABLE OF CONTENTS – Continued

Page

III. PETITIONERS' ATTEMPT TO PORTRAY THE PANEL OPINION AS A ROGUE DECISION ABOUT EXPERT TESTIMONY FINDS NO SUPPORT IN THIS COURT'S PRECEDENT WHICH ALREADY HAS SETTLED THE STANDARD OF REVIEW ISSUE..... 17

CONCLUSION..... 19

TABLE OF AUTHORITIES

Page

CASES

Billiot v. Puckett, 135 F.3d 311 (5th Cir. 1998).....9

Bland v. Verizon Wireless, L.L.C., 538 F.3d 893 (8th Cir. 2008) 16

Compania Administradora de Recuperacion v. Titan, 533 F.3d 555 (7th Cir. 2008).....14, 15

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).....*passim*

Gen Elec. Co. v. Joiner, 522 U.S. 136 (1997) 7, 10

Huss v. Gayden (*Huss I*), 465 F.3d 201 (5th Cir. 2006).....3

Huss v. Gayden (*Huss II*), 2006 WL 5013195 (5th Cir. Dec. 27, 2006) (per curiam).....3

Huss v. Gayden (*Huss III*), 508 F.3d 240 (5th Cir. 2007).....3

Huss v. Gayden (*Huss IV*), 991 So.2d 162 (Miss. 2008).....3

Huss v. Gayden (*Huss V*), 571 F.3d 442 (5th Cir. 2009).....1, 3

Hyatt v. Doll, 576 F.3d 1246 (Fed. Cir. 2009) 16

In re Prempro Prods. Liab. Litig., 586 F.3d 547 (8th Cir. 2009) 16

In re Scrap Metal Antitrust Litig., 527 F.3d 517 (6th Cir. 2008) 16

James v. Harris County, 577 F.3d 612 (5th Cir. 2009).....10

TABLE OF AUTHORITIES – Continued

Page

Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549 (D.C. Cir. 1993).....16

Kannankeril v. Terminix Intern., Inc., 128 F.3d 802 (3rd Cir. 1997).....15

Kempner Mobile Elecs., Inc. v. Sw. Bell Mobile Sys., 428 F.3d 706 (7th Cir. 2005).....12

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1998).....18

Lake Michigan Contractors, Inc. v. Manitowac Co., Inc., 225 F.Supp.2d 791 (W.D. Mich. 2002).....11

Lewis v. Citgo Petroleum Corp., 561 F.3d 698 (7th Cir. 2009).....12, 13

Moore v. Ashland Chem. Inc., 151 F.3d 269 (5th Cir. 1998).....8, 18

Rios v. City of Del Rio, Tex., 444 F.3d 417 (5th Cir. 2006).....9

Ruggiero v. Warner-Lambert Co., 424 F.3d 249 (2nd Cir. 2005).....15

Smith v. Goodyear Tire & Rubber Co., 495 F.3d 224 (5th Cir. 2007).....10

Tanner v. Westbrook, 174 F.3d 542 (5th Cir. 1999).....8

U.S. v. Alatorre, 222 F.3d 1098 (9th Cir. 2000).....11

U.S. v. Allen, Jr., 269 F.3d 842 (7th Cir. 2001).....14

U.S. v. Day, 524 F.3d 1361 (D.C. Cir. 2008).....16

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Frazier, 387 F.3d 1244 (11th Cir. 2004).....16

U.S. v. Gray, 410 F.3d 338 (7th Cir. 2005).....14, 15

U.S. v. Hall, 93 F.3d 1337 (7th Cir. 1996).....13

U.S. v. Pansier, 576 F.3d 726 (7th Cir. 2008).....13

U.S. v. Wofford, 560 F.3d 341 (5th Cir. 2009).....10

Winters v. Fru-Con, Inc., 498 F.3d 734 (7th Cir. 2007).....13

OTHER REFERENCES

FED. R. EVID. 104(a).....11

FED. R. EVID. 702 .....12, 13

FED. R. EVID. 703 12

SUP. CT. R. 10.....4, 5

OPINIONS BELOW

The Fifth Circuit opinion at issue reversing and remanding a judgment for Petitioners is reported at *Huss v. Gayden*, 571 F.3d 442 (2009), and reprinted at Pet. App. A1-A53. The Northern District of Mississippi opinion declining to set aside the jury verdict is not reported in an official or unofficial source. That opinion is reprinted at Pet. App. A53-A68. Excerpts of the transcript of trial proceedings are reprinted at Pet. App. A70-A74. The Fifth Circuit order denying panel and *en banc* rehearing and the related dissenting opinions are reported at *Huss v. Gayden*, 585 F.3d 823 (2009), and reprinted at Pet. App. A75-A99.

STATEMENT OF THE CASE

Petitioners ask this Court to determine whether a panel of the Fifth Circuit Court of Appeals misapplied the abuse of discretion standard of review. The Fifth Circuit ordered a new trial of a medical malpractice case because "the exclusion of [the defendants' expert's] opinion testimony was an abuse of discretion." Pet. 8. Petitioners contend that the Fifth Circuit decision lowers the bar for the admission of testimony from defense experts and highlights a split in the circuit courts concerning the scope of review of trial court *Daubert* rulings. Respondents respectfully disagree and ask the Court to deny the petition because there is no compelling reason for the Court to intervene.

Petitioners Barbara and Rodney Huss allege that defendant Dr. John Gayden's purported negligent prescription and administration of Terbutaline to Mrs. Huss while she was pregnant caused her to develop peripartum cardiomyopathy. Pet. 4. At trial, Petitioners' expert, Dr. Frederick Carlton, Jr., testified that Terbutaline caused Mrs. Huss's cardiomyopathy. Pet. 4. Respondents offered testimony from their expert, Dr. Michael Reddix, to rebut Dr. Carlton's causation opinion. Without objection from the Petitioners, Dr. Reddix testified that cardiomyopathy is idiopathic, meaning that its cause is unknown. Pet. App. A11. Dr. Reddix was prepared to explain that the medical literature on which Dr. Carlton's causation opinion rested was unreliable, in no small part because one of the studies stated that, "[c]aution should be exercised in understanding that the case-control design *does not provide a causative relationship* between the use of oral [Terbutaline] therapy and cardiomyopathy." Pet. App. A33 (emphasis in original). Following objection from Petitioners and a brief hearing outside of the jury's presence, the magistrate judge ruled that Dr. Reddix's proffered testimony was "outside his area of expertise" and excluded the testimony, leaving Respondents with no means to rebut Dr. Carlton's causation opinion. Pet. App. A71. The trial ended with a general verdict for Petitioners.

Respondents appealed the judgment for the Petitioners, asserting multiple grounds for relief. A Fifth Circuit panel initially held that the applicable Mississippi statute of limitations barred the Petitioners'

claims. *Huss v. Gayden* (*Huss I*), 465 F.3d 201, 208-09 (5th Cir. 2006). A majority of active Fifth Circuit judges then voted to deny Petitioners' request for rehearing *en banc*, *Huss v. Gayden* (*Huss II*), 2006 WL 5013195, at *1 (5th Cir. Dec. 27, 2006) (per curiam); however, a Fifth Circuit panel granted Petitioners' request for rehearing. The panel certified the question regarding the statute of limitations issue to the Mississippi Supreme Court. *Huss v. Gayden* (*Huss III*), 508 F.3d 240, 245-48 (5th Cir. 2007). After the Mississippi Supreme Court held that the limitations defense could not be decided as a matter of law, *Huss v. Gayden* (*Huss IV*), 991 So.2d 162, 165 (Miss. 2008), the Fifth Circuit panel turned to the remaining issues that Respondents raised on appeal. *Huss v. Gayden* (*Huss V*), 571 F.3d 442 (5th Cir. 2009). First among them was the expert evidentiary issue that prompted this petition. Finding that the magistrate judge abused his discretion when he excluded Respondents' rebuttal expert testimony, the Fifth Circuit panel reversed the judgment for the Petitioners and remanded the case for a new trial. Pet. App. A1, A25. This petition followed.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Respondents John Overton Gayden, M.D., and Memphis Obstetrics and Gynecological Association, P.C., oppose Petitioners' request for a writ of certiorari and respectfully ask the Court to deny the

petition. "Review on a writ of certiorari is not a matter of right, but of judicial discretion." SUP. CT. R. 10. Petitioners have not offered the Court sufficiently compelling reasons to grant their petition. If there is error in the Circuit Court's opinion, it is neither significant nor likely to be repeated, and the circuit split that Petitioners portray is the product of creative license, not reported case law. At worst, the Circuit Court arguably misapplied a settled, properly stated rule of law. Under these circumstances, there is no reason for this Court to intervene.

I. GIVEN THE UNIQUE, CASE-SPECIFIC CIRCUMSTANCES THAT UNDERLIE THE OPINION AT ISSUE, THE FIFTH CIRCUIT COURT OF APPEALS' ALLEGED MISAPPLICATION OF THE ABUSE OF DISCRETION STANDARD OF REVIEW DOES NOT WARRANT AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

This Court rarely grants a petition for writ of certiorari when the asserted error consists of misapplication of a properly stated rule of law. SUP. CT. R. 10. This case does not provide an exception to the rule. Petitioners complain that the Fifth Circuit Court of Appeals "turn[ed] the abuse of discretion standard on its head" when it reversed the magistrate judge's ruling regarding the exclusion of expert testimony in this medical malpractice case. Pet. 3. Respondents respectfully disagree with Petitioners' contention that the court of appeals

misapplied the standard of review, but even if it did, the alleged error is neither so egregious nor so likely to be repeated that it calls for this Court to exercise its supervisory power. SUP. CT. R. 10.

The Circuit Court's conclusion that the magistrate judge abused his discretion in excluding expert evidence is inextricably tied to the unique circumstances of this medical malpractice case. Petitioners' claims rise and fall on their ability to prove that Barbara Huss developed peripartum cardiomyopathy because she took the drug Terbutaline during her pregnancy. General and specific causation was the crux of the matter; proffered testimony from defendants' causation expert, Dr. Reddix, triggered this petition for writ of certiorari.

Dr. Reddix testified without objection from the Petitioners about general causation, stating that cardiomyopathy is idiopathic, meaning that "the etiology or medical cause of the condition is unknown." Pet. 5; Pet. App. A11. Dr. Reddix's opinion was consistent with testimony from Mrs. Huss's cardiologist, Dr. Gary Murray, who acknowledged that cardiomyopathy is idiopathic. *Id.* at A11. Following Dr. Reddix's general causation testimony, the magistrate judge sustained the Petitioners' objection to questions that defense counsel posed to Dr. Reddix designed to elicit his opinion about whether Terbutaline "caused or contributed to the cardiomyopathy suffered by Barbara Huss." Pet. 5-6. In reviewing the magistrate judge's ruling, the Circuit Court observed that, "[t]he main purpose of Dr. Reddix's opinion was to rebut an

untenable conclusion" that the Petitioners' expert, Dr. Carlton, offered. Pet. App. A26. Dr. Carlton "testified that Terbutaline is known in the medical community to cause cardiomyopathy." *Id.* at A11. The Circuit panel found that, "Dr. Reddix's knowledge qualified him to tell the jury that Dr. Carlton's inferential leap was unsupported by medical literature, and that in his judgment, Barbara's peripartum cardiomyopathy was idiopathic." *Id.* at A26-A27.[1] The Circuit Court concluded, "We believe that the exclusion of Dr. Reddix's opinion testimony was an abuse of discretion." *Id.* at A25.

The panel was troubled by the fact that the magistrate judge allowed Petitioners' expert Dr. Frederick Carlton, Jr., "who is a toxicologist, not a cardiologist," to testify that Terbutaline caused Mrs. Huss's cardiomyopathy "because he could not identify or think of any other reason that Barbara would develop cardiomyopathy." *Id.* at A26. The panel was equally concerned that Dr. Carlton based his specific causation opinion on medical literature concerning studies of very few subjects with statistically insignificant results. *Id.* at A23, A25-A26. In section VI of the opinion below, which is not part of the panel's holding, Judge DeMoss went so far as to recommend

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[1] Throughout their petition, Mr. and Mrs. Huss refer to the Fifth Circuit opinion at issue as the "third panel decision." Although the opinion at issue is the third from the Fifth Circuit in this case, it is the first opinion that addresses the expert evidence issue.

that on remand, the magistrate judge entertain a motion for judgment as a matter of law because Petitioners' expert's causation opinions (both general and specific) "lacked an adequate basis in science or fact," constituted "unjustified conclusions . . . drawn from scant data and chance occurrences," offered "a scientifically untenable thesis," and, most importantly, contradicted the disclaimer in the study upon which the expert's testimony rested that, "[c]aution should be exercised in understanding that the case-control design *does not provide a causative relationship* between the use of oral [Terbutaline] therapy and cardiomyopathy." *Id.* at A32-A34 (emphasis in original). Citing this Court's opinion in *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997), Judge DeMoss explained, "[i]t is axiomatic that causation testimony is inadmissible if an expert relies on studies or publications, the authors of which were themselves unwilling to conclude that causation had been proven." Pet. App. A35. Writing that "[c]ourts must be arbiters of truth, not junk science and guesswork," Judge DeMoss stated in dicta that the magistrate judge should have excluded Dr. Carlton's speculative opinions and entered judgment as a matter of law for the defendants; however, "[g]iven the procedural posture of this case, only a new trial is available." *Id.* at A36-A37.

In this procedural posture then, on a record that contained Dr. Carlton's unreliable causation testimony, the Circuit Court found that "there were sufficient indicia in this case that Dr. Reddix would

provide a reliable opinion in rebuttal to Dr. Carlton's opinion." The Circuit Court held that the magistrate judge abused his discretion when he refused to allow Dr. Reddix to respond to defense counsel's questions because the magistrate "missed the purpose for which defendants sought to elicit Dr. Reddix's opinion." *Id.* at A27. In her dissent to the order denying Petitioners' request for *en banc* rehearing, one of the Fifth Circuit judges described the panel's decision as "a true rarity in this circuit and every other." *Id.* at A98. It is, and that is precisely why the panel decision is unfit for review by this Court. The unique features of this litigation isolate any alleged error to the particular facts of this case.

If there is error in the Circuit Court's decision, it might best be described as a textbook case of bad facts making bad law, but the panel opinion does not even make binding law in the Fifth Circuit Court of Appeals. Judge Elrod pointed out in her dissenting opinion regarding *en banc* rehearing that the panel opinion is not binding because it conflicts with two prior Fifth Circuit opinions, *Tanner v. Westbrook*, 174 F.3d 542 (5th Cir. 1999), and *Moore v. Ashland Chem. Inc.*, 151 F.3d 269 (5th Cir. 1998).[2] "'[W]here two

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[2] *See Tanner v. Westbrook*, 174 F.3d 542, 548 (5th Cir. 1999) (holding that it is an abuse of discretion to admit testimony from an expert witness with "generalized medical knowledge" when an opinion on a specific issue requires "knowledge of a complicated, specialized medical subject matter"); *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 277 (5th Cir. 1998) (holding that a district court is within its discretion in excluding expert testimony

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previous holdings or lines of precedent conflict the earlier opinion controls and is the binding precedent in this circuit.'" Pet. App. A98 (quoting *Rios v. City of Del Rio, Tex.*, 444 F.3d 417 (5th Cir. 2006)); *see also Billiot v. Puckett,* 135 F.3d 311, 316 (5th Cir. 1998) ("As a general rule, one panel may not overrule the decision of a prior panel, right or wrong, in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court."). To the extent that there is purported error in the Circuit Court's opinion, it is contained under the Fifth Circuit's rules of intra-circuit stare decisis, and the Fifth Circuit is capable of and equipped to reconcile alleged conflicts within its court in due course.

Given the unique circumstances that give rise to a fact-specific panel decision that does not appear to be binding in the Fifth Circuit Court of Appeals, this case provides no basis for this Court to make an exception to the general rule that it will not review an alleged misapplication of a properly stated rule of law. Respondents contend that the circuit courts of appeal should apply the abuse of discretion standard when reviewing expert evidence issues; the Fifth Circuit did just that. Petitioners simply are dissatisfied with the outcome of the appellate review. Their discontent does not provide a basis for this Court to intervene.

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on causation when too great of an "analytical gap" exists between the available data and the opinion proffered).

Respondents respectfully ask the Court to deny the petition for writ of certiorari.

II. PETITIONERS' ATTEMPT TO MANUFACTURE A CIRCUIT SPLIT REGARDING THE STANDARD OF REVIEW IS UNSUCCESSFUL.

The federal appellate courts uniformly apply this Court's rule that, "All evidentiary decisions are reviewed under an abuse-of-discretion standard." *Joiner*, 522 U.S. at 141. Petitioners erroneously suggest that the Fifth and Seventh Circuits apply a *de novo* standard of review when considering whether an expert is qualified to offer a particular opinion. Like all other circuits, the Fifth and Seventh Circuits review a district court's ruling on expert evidence for abuse of discretion.

Petitioners' argument that the Fifth Circuit departs from the norm begins with the self-defeating admission that, "[t]he 5th Circuit acknowledges that the admission or exclusion of expert testimony is reviewed for abuse of discretion." Pet. 12. This is correct: the Fifth Circuit applies the abuse of discretion standard for such reviews. *James v. Harris County*, 577 F.3d 612, 619 (5th Cir. 2009) ("We review a district court's rejection of expert testimony for abuse of discretion."); *see also U.S. v. Wofford*, 560 F.3d 341, 346 (5th Cir. 2009) ("We review the district court's decision to exclude expert testimony under an abuse of discretion standard."); *Smith v. Goodyear Tire &*

Rubber Co., 495 F.3d 224, 226 (5th Cir. 2007) ("The exclusion of expert testimony is reviewed for an abuse of discretion," and, "District courts enjoy wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous.").

Petitioners attempt to identify a divergence from precedent by noting that the Fifth Circuit, citing FED. R. EVID. 104(a), stated below that "[w]hether an individual is qualified to testify as an expert is a question of law." Pet. App. A20. Numerous courts conducting *Daubert* analysis have observed that their role as gatekeepers for expert evidence falls under the umbrella of Rule 104(a)'s requirement that "[p]reliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court. . . ." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.") (footnotes omitted); *see, e.g.*, *U.S. v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000) ("The trial court, acting as gatekeeper, is required to assess, pursuant to Rule 104(a), whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will help the factfinder understand or decide a fact in issue.") (internal quotations omitted); *Lake Michigan*

Contractors, Inc. v. Manitowoc Co., Inc., 225 F.Supp.2d 791, 794 (W.D. Mich. 2002) ("[I]n determining whether to admit expert testimony, a trial court must act as a gatekeeper under Rule 104(a) and examine 'whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.'") (quoting *Daubert*, 509 U.S. at 592). This threshold proposition does not alter the circuit courts' ultimate standard of review, and it did not here. The sentence upon which the Petitioners' fix in the *Huss* opinion – "[w]hether an individual is qualified to testify as an expert is a question of law" – is followed immediately by the statement, "However, we review the admission or exclusion of expert testimony for an abuse of discretion." Pet. App. A20. The Fifth Circuit's statement of the standard of review is consistent with *Joiner* and with every other circuit.

As for the Seventh Circuit, that court also reviews a district court's admission or exclusion of expert testimony on a particular matter for abuse of discretion. *Kempner Mobile Elecs., Inc. v. Sw. Bell Mobile Sys.*, 428 F.3d 706, 712 (7th Cir. 2005) ("[W]e review for abuse of discretion the district court's [. . .] conclusions regarding the admissibility of expert testimony."). The court uses a two-step test for performing such review. First, the court reviews *de novo* whether the district court applied the correct legal standard in determining the admissibility of expert evidence, i.e., FED. R. EVID. 702 and 703 and the *Daubert* factors. 509 U.S. 579 (1993); *Lewis v.*

Citgo Petroleum Corp., 561 F.3d 698, 705 (7th Cir. 2009) ("[W]e review *de novo* whether the court employed the correct legal standard in reaching its admissibility decision."). Once satisfied that the district court followed the proper standard, the Seventh Circuit reviews "whether the court abused its discretion in its 'choice of factors [included] within that framework as well as [the district court's] ultimate conclusions regarding the admissibility of expert testimony.'" *Id.* (quoting *Winters v. Fru-Con Inc.*, 498 F.3d 734, 742 (7th Cir. 2007)); *see also U.S. v. Pansier*, 576 F.3d 726, 737-38 (7th Cir. 2008) ("We review *de novo* whether the court applied the legal framework required under Rule 702 and *Daubert,* and we review the court's decision to admit or exclude expert testimony for abuse of discretion."); *U.S. v. Hall,* 93 F.3d 1337, 1342 (7th Cir. 1996) (when reviewing a lower court ruling concerning the admissibility of scientific evidence, the circuit court reviews *de novo* whether the district court "properly followed" the *Daubert* framework; if the district court did so, the circuit court will overturn a ruling only if it was clearly erroneous). The Seventh Circuit uses a *de novo* standard only in evaluating whether the district court applied the correct legal test. The circuit court reviews all other matters, including whether an expert was qualified under that test to opine on a specific matter, under the abuse of discretion standard. *Lewis*, 561 F.3d at 705 ("Thus, we review the substance of the court's evidentiary decisions only for an abuse of discretion.").

Petitioners cite *U.S. v. Gray*, 410 F.3d 338 (7th Cir. 2005), and *Compania Administradora de Recuperacion v. Titan*, 533 F.3d 555 (7th Cir. 2008), for the proposition that the Seventh Circuit reviews district court rulings on an expert qualifications *de novo*. This is incorrect – the *Gray* and *Compania* opinions follow the Seventh Circuit's two-step process. In *Gray*, the court stated that its "review of whether [the witness in question] was properly qualified as an expert [was] *de novo*," while its review of "the decision to admit the testimony [was] for an abuse of discretion." 410 F.3d 338, 347 (7th Cir. 2005). Although perhaps awkwardly phrased, this statement of the law is accurate and in accord with the other circuits when viewed in context. *Gray* cites *U.S. v. Allen, Jr.*, 269 F.3d 842 (7th Cir. 2001), in discussing the standard of review for evidentiary rulings. *Gray*, 410 F.3d at 347. In *Allen, Jr.*, the Seventh Circuit articulated its two-step process clearly: "We review whether the trial court properly applied the *Daubert* framework *de novo*. [. . .] If we determine that the trial court properly applied the *Daubert* framework, we review the decision to admit or exclude expert testimony for abuse of discretion." 269 F.3d at 845. In light of the standard of review applied in *Allen, Jr.* and in all other Seventh Circuit cases, it is unmistakable that when the court in *Gray* stated that it reviewed *de novo* whether a witness was "properly qualified as an expert," it referred to whether the district court applied the proper standard, not to whether the district court applied that standard correctly. 410 F.3d at 347.

Petitioners' interpretation of *Compania* suffers from similar problems. *Compania* acknowledges that the Seventh Circuit reviews a district court's decision to admit or exclude expert testimony "for an abuse of discretion," 533 F.3d 555, 559 (7th Cir. 2008), and cites the correct but unusually worded standard of review announced in *Gray*. *Id.* As with *Gray*, when viewed in context, *Compania* is a correct statement of the law and is in accord with other circuits.

Thus, the standard of review concerning expert evidence is consistent among the circuit courts of appeals. Petitioners acknowledge that the First, Fourth, Ninth, and Tenth Circuits review a district court's evidentiary determinations for abuse of discretion. Pet. 11-12 ("The 1st, 4th, 9th and 10th Circuits clearly apply [. . .] the deferential abuse of discretion standard of review."). Moreover, Petitioners make no argument that the Second, Third, Sixth, Eighth, Eleventh, Federal, or District of Columbia Circuits applies a different standard. Such an argument would be fruitless because these circuit courts review a district court's ruling on expert testimony for abuse of discretion. *See, e.g., Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 253-54 (2nd Cir. 2005) ("A district court's decision as to how the reliability of expert testimony should be determined, as well as the ultimate decision as to whether that testimony is reliable, are reviewed for abuse of discretion."); *Kannankeril v. Terminix Intern., Inc.*, 128 F.3d 802, 806 (3rd Cir. 1997) ("A district court's ruling on admissibility of expert testimony is reviewed for

abuse of discretion."); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 528 (6th Cir. 2008) ("We review for abuse of discretion the district court's determination to admit or exclude expert testimony, recognizing, of course, that such review calls for deference to the district court's decision.") (internal citations omitted); *In re Prempro Prods. Liab. Litig.*, 586 F.3d 547, 565 (8th Cir. 2009) ("'[A]bsent a clear and prejudicial abuse of discretion,' we will not reverse a district court's determination on the admissibility of expert testimony.") (quoting *Bland v. Verizon Wireless, L.L.C.*, 538 F.3d 893, 896 (8th Cir. 2008)); *U.S. v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) ("We review for abuse of discretion the district court's decisions regarding the admissibility of expert testimony and the reliability of an expert opinion."); *Hyatt v. Doll*, 576 F.3d 1246, 1273 (Fed. Cir. 2009) ("[T]o the extent that district court evidentiary rulings apply the correct legal standard, we review them for abuse of discretion."); *U.S. v. Day*, 524 F.3d 1361, 1367 (D.C. Cir. 2008) ("A district court has broad discretion regarding the admission or exclusion of expert testimony, and reversal of a decision on these matters is appropriate only when that discretion has been abused.") (quoting *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567 (D.C. Cir. 1993) (internal quotations omitted)).

There is no circuit split. Consequently, Respondents respectfully ask the Court to deny the petition for writ petition.

III. PETITIONERS' ATTEMPT TO PORTRAY THE PANEL OPINION AS A ROGUE DECISION ABOUT EXPERT TESTIMONY FINDS NO SUPPORT IN THIS COURT'S PRECEDENT WHICH ALREADY HAS SETTLED THE STANDARD OF REVIEW ISSUE.

Petitioners' argument that the panel found "as a matter of law [that] a professional who is licensed to practice as a generalist for several years necessarily possesses knowledge to evaluate the soundness of published research and testify on complex issues in very specialized areas of his profession" is particularly perplexing. Pet. 17. At no point does the panel opinion suggest as "a rule of law" that "general medical school training of any licensed physician along with the treatment of patients in general primary care is sufficient to testify." *Id.* at 26. The panel's decision regarding the admissibility of Dr. Reddix's specific causation testimony was based on the particular facts of this case. The panel held that, "Dr. Reddix did not need to be board-certified in cardiology or toxicology to explain that the studies relied on by the Husses do not prove a causative relationship – especially given the very small number of patients in those studies." Pet. App. A25.

In holding that the magistrate judge's decision to exclude Dr. Reddix's specific causation testimony "was an abuse of discretion," the panel noted that, "[t]he *Daubert* standards are flexible, and the most important question is not whether one party's expert

is more qualified than the other's, but rather, whether an expert's testimony is reliable." *Id.* at A27. Far from reflecting a departure from settled standards for the admissibility of expert testimony, the panel's opinion is consistent with binding precedent. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1998) (*Daubert's* "gatekeeping inquiry must be 'tied to the facts' of a particular 'case' " because "[t]oo much depends upon the particular circumstances of the particular case at issue"); *Daubert*, 509 U.S. at 597 (district court must determine whether "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"); *Moore*, 151 F.3d at 275 (holding that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" and noting that *Daubert* provides a flexible test).

In this case, the Circuit panel held that the magistrate judge abused his discretion in finding that the defendants' causation expert needed more than general medical knowledge to rebut the Petitioners' "expert" causation opinion, given the unreliable, unscientific studies on which the opinion was based. One of those studies contained the express disclaimer that its "case-control design *does not provide a causative relationship* between the use of oral [Terbutaline] therapy and cardiomyopathy." Pet. App. A33 (emphasis in original). It is difficult to imagine a more fact-specific analysis. Because the panel decision is not a departure from settled precedent concerning the

reliability of expert scientific opinions, it does not offer a compelling reason for this Court to weigh in.

CONCLUSION

Petitioners have presented no compelling reason for the Court to review the Court of Appeals' application of settled legal standards in this case. The petition for writ of certiorari should be denied.

Respectfully submitted,

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